REPORT OF THE COMMITTEE ON LEGISLATION AND INTERGOVERNMENTAL RELATIONS

PUBLIC HEARING

February 9, 2012

The Honorable,
The Board of Commissioners of Cook County

ATTENDANCE

Present: Chairman Suffredin, Vice Chairman Fritchey, Commissioners Beavers, Butler, Collins, Daley, Gainer, Garcia, Gorman, Murphy, Reyes, Schneider, Silvestri, Sims, Steele and Tobolski (16)

Absent: Commissioner Goslin (1)

Also Present: Patrick Driscoll, Jr. – Deputy State's Attorney, Chief, Civil Actions Bureau

Court Reporter: Anthony W. Lisanti, C.S.R.

Ladies and Gentlemen:

Your Committee on Legislation and the Intergovernmental Relations of the Board of Commissioners of Cook County met pursuant to notice on Thursday, February 9, 2012 at the hour of 10:00 A.M. for a public hearing in the Board Room, Room 569, County Building, 118 North Clark Street, Chicago, Illinois.

The Secretary informed Chairman Suffredin that a quorum was present.

Chairman Suffredin asked the Secretary to the Board to call upon the registered public speakers, in accordance with Cook County Code, Sec. 2-107(dd).

Name	Organization
1. Gerald Bromley	Concerned Citizen
2. Michael Madia	Concerned Citizen
3. George Blakemore	Concerned Citizen
4. Adam Schwartz	Senior Staff Attorney, ACLU of Illinois
5. Jorge Avulos	Volunteer, Interfaith Leadership Project
6. Fred Tsao	Illinois Coalition for Immigrant and Refugee Rights
7. Thomas Weitzel	Riverside Police Department

8. Michael Alsop	North Suburban Police Chiefs Association
9. Christopher A. Garcia	Law Office of the Cook County Public Defender
10. Mary Meg McCarthy	Heartland Alliance's National Immigrant Justice Center
11. Carolina Rivera	Community Leader, Southwest Organizing Project
12. Dawn Mueller	No Harbor
13. Claudia Henriquez	Mexican American Legal Defense and Educational Fund
14. Maria Pesqueira	Mujeres Latinas en Accion and ICIRR
15. Yesenia Sanchez	P.A.S.O. – West Suburban Action Project
16. Jose Luis Gutierrez	La Federación de Clubes Michoacanos en Illinois
17. Father Brendan Curran, O.P.	Priests for Justice for Immigrants; St. Pius V Church
18. Jane Ramsey	President, Jewish Council on Urban Affairs
19. Monika Starczuk	Polish Initiative Chicago
20. Charles Butler	Aricent LLC
21. Joseph Watkins	Concerned Citizen
22. Paul McKinley	Concerned Citizen

Additionally, the following presentations were recognized by Chairman Suffredin:

Brian McCann	Concerned Citizen
Honorable Tom Dart	Cook County Sheriff
Honorable Rod Craig	Mayor, Village of Hanover Park
Juliana Stratton	Judicial Advisory Council

The following individuals submitted written testimony only:

Ahlam Jbara	Interim Executive Director, The Council of Islamic Organizations of Greater Chicago (CIOGC)
Leone Jose Bicchieri	Executive Director, Chicago Workers' Collaborative

316283 AN AMENDMENT TO POLICY FOR RESPONDING TO ICE DETAINERS (PROPOSED ORDINANCE AMENDMENT). Submitting a Proposed Ordinance Amendment sponsored by Timothy O. Schneider, Elizabeth "Liz" Doody Gorman and Gregg Goslin, County Commissioners.

PROPOSED ORDINANCE AMENDMENT

Sec. 46-37. Policy for responding to ICE detainers.

(a) The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed or the individual referenced in the detainer:

(1) Has been charged with:

(A) A felony which is a "forcible felony" in Illinois, or the equivalent under the law of any other jurisdiction, as defined in 720 ILCS 5/2-8 treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability; or

(B) A Class 2 felony or greater offense under the Illinois Controlled Substances Act, 720 ILCS 570/100 et seq., the Cannabis Control Act, 720 ILCS 550/1 et seq., or the Methamphetamine Control and Community Protection Act, 720 ILCS 646/1 et seq., or the equivalent under the law of any other jurisdiction; or

(C) A felony offense under the Illinois Compiled Statutes resulting in the death, great bodily harm or permanent disability or disfigurement of any individual; or

(2) Is listed on the Terrorist Identities Datamart Environment (TIDE)

(b) Unless ICE agents have a criminal warrant, or County officials have examined the individuals criminal history and believe the individual is eligible to have his detainer honored pursuant to 46-37(a), ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty.

(c) There being no legal authority upon which the federal government may compel an expenditure of County resources to comply with an ICE detainer issued pursuant to 8 USC § 1226 or 8 USC § 1357(d), there shall be no expenditure of any County resources or effort by on-duty County personnel for this purpose, except as

expressly provided within this Ordinance.

(d) Any person who alleges a violation of this Ordinance may file a written complaint for investigation with the Cook County Sheriff's Office of Professional Review.

(e) Nothing in this Section shall prohibit, or be construed as prohibiting the Sheriff of Cook County from identifying and reporting any person pursuant to State and federal law or regulation who is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of the immigration laws. In addition, nothing in this Section shall preclude any County department, agency, officer, or employee from (a) reporting information to ICE regarding an individual who has been booked at any county jail facility, and who has previously been convicted of a felony under the laws of the State of Illinois; (b) cooperating with an ICE request for information regarding an individual who has been convicted of a felony committed in violation of the laws of the State of Illinois; or (c) reporting information as required by federal or state statute, regarding an individual who has been convicted of a felony committed in violation of the laws of the State of Illinois.

Effective Date: This Ordinance Amendment shall be in effect immediately upon adoption.

***Referred to the Committee on Legislation and Intergovernmental Relations on January 18, 2012.**

316311 AN AMENDMENT TO POLICY FOR RESPONDING TO ICE DETAINERS (PROPOSED ORDINANCE AMENDMENT). Submitting a Proposed Ordinance Amendment sponsored by Peter N. Silvestri and John P. Daley, County Commissioners.

PROPOSED ORDINANCE AMENDMENT

POLICY FOR RESPONDING TO ICE DETAINERS

Sec. 46-37. Policy for responding to ICE detainers.

(a) The Sheriff of Cook County ~~shall~~ may decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.

~~(b) Unless ICE agents have a criminal warrant, or county officials have a legitimate law enforcement purpose that is not related to the enforcement or immigration laws, ICE agents shall not be given access to individuals or allowed to use county facilities for investigative interviews or other purposes, and county personnel shall not expend their time responding to ICE inquires or communicating with ICE regarding individuals' incarceration status or release dates while on duty.~~

~~(c)~~ (b) ~~There being no legal authority upon which the federal government may compel an expenditure of county resources to comply with an ICE detainer issued pursuant to 8 USC § 1226 or 8 USC § 1357(d);~~ tThere shall be no expenditure of any County resources or effort by on-duty County personnel for this purpose, except at the discretion of the Sheriff of Cook County or as expressly provided within this Ordinance.

~~(d)~~ (c) Any person who alleges a violation of this Ordinance may file a written complaint for investigation with the Cook County Sheriff's Office of Professional Review.

~~(e)~~ (d) Nothing in this Section shall prohibit, or be construed as prohibiting, the Sheriff of Cook County from identifying and reporting any person pursuant to state and federal law or regulation who is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of any state or federal laws. In addition, nothing in this Section shall preclude any county department, agency, officer, or employee from reporting or cooperating with an ICE request for information regarding an individual who has been convicted of a felony committed in violation of the laws of the State of Illinois.

Effective Date: This Ordinance Amendment shall be effective immediately upon adoption.

***Referred to the Committee on Legislation and Intergovernmental Relations on January 18, 2012.**

Commissioner Daley moved to adjourn the meeting, seconded by Commissioner Silvestri. The motion carried and the meeting was adjourned.

YOUR COMMITTEE RECOMMENDS THE FOLLOWING ACTION WITH REGARD TO THE MATTERS NAMED HEREIN:

Communication Number 316283	No Action Taken
Communication Number 316311	No Action Taken

Respectfully submitted,
Committee on Legislation and
Intergovernmental Relations

Larry Suffredin, Chairman

Attest:

Matthew B. DeLeon, Secretary

The transcript for this meeting is available in the Office of the Secretary to the Board, 118 North Clark Street, Room 567, Chicago, IL 60602.

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Larry Suffredin

Commissioner – 13th District
Cook County Board of Commissioners

Chair
Legislation and Intergovernmental Relations Committee
Rules and Administration Committee

Member
Criminal Justice Committee
Finance Committee
Litigation Sub-Committee
Health and Hospitals Committee
Homeland Security and Emergency Management Committee
Human Relations Committee
Pensions Subcommittee
Roads & Bridges Committee
Veterans Committee
Workforce, Job Development and Training Committee
Zoning and Building Committee

Legislation and Intergovernmental Relations Committee
Cook County Board of Commissioners
February 9, 2012

Documents to be included in the Record

1. Decision in Ingrid Buquer, et. al. v. City of Indianapolis, 2011 U.S. Dist. Lexis 68326 (S.D. Ind. June 24, 2011)

2. Opinion from the Office of the Cook County State's Attorney; dated July 26, 2011; re: Duty to Enforce ICE Detainers

3. Opinion from the Office of the Cook County State's Attorney; dated September 14, 2011; re: Board's Budget Authority – ICE Detainer Ordinance

4. Opinion from the Office of the Cook County State's Attorney; dated October 5, 2011; re: 11-335 Legitimate Law Enforcement Purpose Pursuant to 11-O-73

5. Letter from Cook County Sheriff Thomas Dart to Cook County Commissioner Larry Suffredin; dated December 15, 2011

6. Letter from John Morton, Director of United States Immigration and Customs Enforcement to Cook County President Toni Preckwinkle; dated January 4, 2012

7. Letter from Cook County President Toni Preckwinkle to John Morton, Director of United States Homeland Security; dated January 19, 2012

8. Opinion from the Office of the Cook County State's Attorney; dated January 12, 2012; re: 12-05: Sheriff's Proposed Revisions to ICE Detainer Ordinance

9. Letter from Hanover Park Village President Rodney Craig to Cook County Commissioner Larry Suffredin; dated January 18, 2012

10. Letter from the Cook County Public Defender; dated February 1, 2012; Re: Ordinance 46-37 and Proposed Amendments

11. Letter from Cook County Sheriff Thomas Dart to John Morton, Director of U.S. Immigration and Customs Enforcement; dated January 20, 2012

Document 1

Decision in Ingrid Buquer, et. al. v. City of Indianapolis, 2011 U.S. Dist. Lexis 68326 (S.D. Ind. June 24, 2011)

LexisNexis®

INGRID BUQUER, BERLIN URTIZ, and LOUISA ADAIR, on their own behalf and on behalf of those similarly situated, Plaintiffs, vs. CITY OF INDIANAPOLIS, et al., Defendants.

1:11-cv-708-SEB-MJD

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

2011 U.S. Dist. LEXIS 68326

June 24, 2011, Decided
June 24, 2011, Filed

CASE SUMMARY:

OVERVIEW: Plaintiffs' motion for preliminary injunction was granted so that State of Indiana was enjoined from enforcing the recently enacted laws in Indiana Code § 34-28-8.2 and *Indiana Code § 35-33-1-1(a)(11)-(a)(13)* because the laws expressly provided that law enforcement officers could arrest individuals for conduct that parties agreed was not criminal.

OUTCOME: Motions for preliminary injunctions were granted.

LexisNexis(R) Headnotes

Immigration Law > Enforcement > State Enforcement
[HN1] In certain limited situations, federal law permits the delegation of authority to enforce civil immigration law to state and local law enforcement. For example, the Department of Homeland Security is permitted to enter into written agreements with states or any political subdivision of a state to allow appropriately trained and supervised officers or employees of the state or subdivision to perform certain immigration responsibilities. *8 U.S.C.S. § 1357(g)(1).*

Criminal Law & Procedure > Arrests > General Overview
Criminal Law & Procedure > Arrests > Probable Cause
[HN2] See *Ind. Code § 35-33-1-1(a)(11)-(a)(13).*

Immigration Law > Admission > General Overview
[HN3] The Immigration and Nationality Act, *8 U.S.C.S. § 1101 et seq.*, contains provisions that set forth the conditions under which a foreign national may be admitted to and remain in the United States, establish civil penalties and criminal sanctions for immigration violations, and grant the Department of Homeland Security the discretion to place non-citizens into removal proceedings for various actions. Unlawful presence in the United States on its own is not a federal crime, although it can lead to the civil remedy of removal. *8 U.S.C.S. §§ 1182(a)(6)(A)(I), 1227(a)(1)(B), (C).* Removal proceedings take place within an administrative immigration court system within the Department of Justice. *8 C.F.R. § 1003.0 et seq.*

Immigration Law > Deportation & Removal > Administrative Proceedings > Procedure
[HN4] If the Attorney General of the United States issues a warrant after removal proceedings have been initiated against an individual under federal law, that person may be arrested and detained pending a final removal decision. *8 U.S.C.S. § 1226(a).* However, removal does not occur in every case. After removal proceedings are initiated, the noncitizen may still be released during the pendency of removal proceedings. Under *8 U.S.C.S. § 1226(a)*, the individual may be released on bond or conditional parole or be provided with work authorization. *8 U.S.C.S. § 1226(a)(3).* After a removal order is issued by

an immigration judge, the non-citizen has the right to seek reconsideration as well as administrative and judicial review of that determination and may be released on bond until a final determination is made. *8 U.S.C.S. § 1229a(c)(5)*. Even after issuance of a final removal order, the individual may, in some circumstances, move to reopen the removal proceedings. *8 U.S.C.S. § 1229a(c)(7)*. If the Attorney General fails to remove the non-citizen within 90 days after the removal order becomes final, the individual is released from detention, subject to supervision by the Attorney General. *8 U.S.C.S. § 1231(a)(3)*. Finally, in lieu of deportation, the Attorney General may allow an alien to voluntarily depart the United States during a predetermined period of time. *8 U.S.C.S. § 1229c*.

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond

[HN5] If federal or local law enforcement informs the United States Immigration and Customs Enforcement (ICE) that an alien is in custody on non-immigration related charges, ICE may issue a detainer requesting that the law enforcement agency hold the individual for up to 48 hours (not including weekend days and holidays) beyond the time that the detainee would otherwise be released in order to allow ICE to assume custody if it chooses to do so. *8 C.F.R. § 287.7(d)*. A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency advise the Department of Homeland Security (DHS) prior to release of the alien in order for DHS to arrange to assume custody. *8 C.F.R. § 287.7(a)*. The detainer automatically expires at the end of the 48 hour period.

Immigration Law > Deportation & Removal > Administrative Proceedings > Procedure
Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies

[HN6] The Immigration and Nationality Act, *8 U.S.C.S. § 1101 et seq.* provides that an alien convicted of an aggravated felony is subject to removal and may not receive asylum in the United States, become a citizen, lawfully reenter the United States, or have removal orders cancelled by the Attorney General. *8 U.S.C.S. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(I)*; 1227 (a)(2)(A)(iii); 1229b(a)(3). However, it is often unclear whether a particular crime constitutes an aggravated felony under federal immigration law. "Aggravated felony" is defined under *8 U.S.C.S. § 1101(a)(43)*, which encompasses 21 subsections, many of which themselves contain multiple crimes. Thus, determining whether a particular crime meets the definition is a complex analytical undertaking one with which many courts routinely grapple as have Executive Branch agencies and departments charged with enforcing this law.

Criminal Law & Procedure > Arrests > General Overview
Criminal Law & Procedure > Arrests > Probable Cause

[HN7] See Ind. Code § 34-28-8.2.

Immigration Law > Admission > Visas > Consular Processing
Immigration Law > Admission > Visas > Issuance

[HN8] The Vienna Convention on Consular Relations, to which the United States is a signatory, provides that a foreign consulate may issue travel documents, visas, or other appropriate documents to protect and assist its citizens in the foreign country. Consular identification documents are photo identification cards issued by many embassies and consulates including the United States to encourage their citizens abroad to register with the consulates so that they can receive standard consular services, be notified if necessary, and be located upon inquiry by relatives and authorities. The issuance of these identification documents is a matter which the respective foreign governments closely supervise and tightly manage.

Immigration Law > Admission > Visas > Consular Processing

[HN9] Under the Vienna Convention on Consular Relations, a foreign national arrested or detained in the United States must be advised of his or her right to request that appropriate consular officials be timely notified of the individual's detention. Thus, individuals can use consular identification documents (CID) to alert federal, state, and local law enforcement authorities of the need to notify consular officials when assistance is required. Cardholders also commonly use CIDs for identification purposes, such as with financial institutions, law enforcement agencies, and state and local governments in the United States, as well as for other transactions that require photo identification, including cashing checks, renting housing, or enrolling children in school, especially when no other forms of photo identification are available to them for their use.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN10] The grant of injunctive relief is appropriate if the moving party is able to demonstrate: (1) a reasonable likelihood of succeeding on the merits; (2) irreparable harm if preliminary relief is denied; and (3) an inadequate remedy at law. If the moving party fails to demon-

strate any one of these three threshold requirements, the emergency relief must be denied. However, if these threshold conditions are met, the court must then assess the balance of harm and, where appropriate, also determine what effect the granting or denying of the injunction would have on nonparties the public interest.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
[HN11] In determining whether to grant injunctive relief, the district court must take into account all four of the applicable factors and then exercise its discretion to arrive at a decision based on the subjective evaluation of the import of the various factors and a personal, intuitive sense about the nature of the case. This process involves engaging in what is called the sliding scale approach, meaning that the more likely it is the plaintiff will succeed on the merits, the less balance of irreparable harms need weigh toward its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side. The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
[HN12] To have standing to seek injunctive relief, a plaintiff must show that he is under threat of suffering injury in fact that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Criminal Law & Procedure > Arrests > Probable Cause
[HN13] *Ind. Code § 35-33-1-1(a)(11)-(a)(13)* specifically authorizes the arrest of anyone for whom an officer has probable cause to believe has been convicted of one or more aggravated felonies. *Ind. Code § 35-33-1-1(a)(13)*. Whenever the Indiana General Assembly seeks to have the term conviction exclude convictions that have been reversed or vacated, it makes that intention clear.

Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN14] The existence of a statute implies a threat to prosecute and thus pre-enforcement challenges are proper, because a probability of future injury counts as injury for the purpose of standing.

Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN15] To determine whether a case is ripe for adjudication, a court must determine first, whether the relevant issues are sufficiently focused so as to permit judicial resolution without further factual development; and second, whether the parties would suffer any hardship by the postponement of judicial action. The first factor is generally met where the issues posed are purely legal and would not be clarified by administrative proceedings or any other type of factual development.

Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN16] A plaintiff need not be required to undergo arrest and prosecution before being able to challenge the constitutionality of a statute. As long as there is a credible threat of enforcement, the second prong of the ripeness doctrine is satisfied. Such a threat is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will not enforce the statute.

Criminal Law & Procedure > Arrests > Probable Cause
[HN17] An arrest is reasonable under *U.S. Const. amend. IV* so long as there is probable cause to believe that some criminal offense has been or is being committed. In evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court or enforcement agency has proffered. However, a federal court may not slice and dice a state law to save it; courts must apply the United States Constitution to the law the state enacted and not attribute to the state a law we could have written to avoid the problem.

Criminal Law & Procedure > Arrests > General Overview
Criminal Law & Procedure > Arrests > Probable Cause
[HN18] *Ind. Code § 35-33-1-1(a)(11)-(a)(13)* expressly provides that state and local enforcement officers may arrest individuals for conduct that is not criminal. The statute contains no reference to *U.S. Const. amend. IV* protections nor does it include a requirement that the arrest powers granted to law enforcement officers under *Ind. Code § 35-33-1-1(a)(11)-(a)(13)* be used only in circumstances in which the officer has a separate, lawful reason for the arrest. There is no mention of any re-

quirement that the arrested person be brought forthwith before a judge for consideration of detention or release.

Constitutional Law > Supremacy Clause > Federal Preemption

[HN19] By virtue of the *Supremacy Clause*, it is a fundamental principle of the United States Constitution that Congress has the power to preempt state law. Preemption, express or implied, is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. In cases in which Congress has not explicitly provided for preemption in a given statute, state law must still yield in two circumstances. First, when Congress intends federal law to occupy the field, state law in that area is preempted. Even if Congress has not occupied the field, state law is preempted as well where it conflicts with federal law. Conflicts arise when compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. To determine whether obstacle preemption exists, a court must employ its judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.

Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies

[HN20] Federal law specifies that the immigration penalties associated with aggravated felonies arise only if the individual has been convicted of the offense. *8 U.S.C.S. § 1101(a)(43).* Yet *Ind. Code § 35-33-1-1(a)(11)-(a)(13)* allows state and local law enforcement to arrest those who they have probable cause to believe have merely been indicted for such an offense. Considering that the determination of whether a crime constitutes an aggravated felony is often such a complex and confusing undertaking, and that there is no guidance in *Ind. Code § 35-33-1-1(a)(11)-(a)(13)* as to how a state or local officer should make that determination, the power to arrest on that basis threatens serious abuses. Regardless, authorizing the arrest of individuals who have been indicted but not yet convicted of an aggravated felony runs counter to the federal intent to limit such penalties. Even in cases where there has been a conviction covered under *Ind. Code § 35-33-1-1(a)(11)-(a)(13)*, if the federal government fully resolves the issue of the alien's conviction and determines that no penalty will be imposed, a subsequent arrest by state authorities directly conflicts with the federal determination.

Constitutional Law > The Presidency > Foreign Affairs

[HN21] The executive branch's authority over matters of foreign affairs is an implied constitutional power. The exercise of the federal executive authority means that state law must give way where there is evidence of clear conflict between the policies adopted by the two.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Constitutional Law > Equal Protection > Scope of Protection

[HN22] Under traditional due process and equal protection analysis, state action must be sustained as long as it bears a rational relation to a legitimate governmental interest.

Constitutional Law > Equal Protection > Full & Equal Benefit

[HN23] If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN24] When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary. Moreover, showing irreparable harm is probably the most common method of demonstrating that there is no adequate legal remedy.

Constitutional Law > Supremacy Clause > General Overview

[HN25] The public has a strong interest in the vindication of an individual's constitutional rights. In such circumstances, the interest of preserving the *Supremacy Clause* is paramount.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN26] *Fed. R. Civ. P. 65(c)* provides that the court may issue a preliminary injunction only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. Under appropriate circumstances bond may be excused, notwithstanding the literal language of *Rule 65(c)*.

COUNSEL: [*1] For INGRID BUQUER, BERLIN URTIZ, LOUISA ADAIR, on their own behalf and on behalf of those similarly situated, Plaintiffs: Andre I. Segura, Lee Gelernt, Omar C. Jadwat, PRO HAC VICE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECTS, New York, NY; Angela Denise Adams, LEWIS & KAPPES, Indianapolis, IN; Cecillia D. Wang, Katherine Desormeau, PRO HAC VICE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT, San Francisco, CA; Gavin Minor Rose, Jan P. Mensz, Kenneth J. Falk, ACLU OF INDIANA, Indianapolis, IN; Karen Tumlin, Linton Joaquin, PRO HAC VICE, NATIONAL IMMIGRATION LAW CENTER, Los Angles, CA.

For CITY OF INDIANAPOLIS, Defendant: Jennifer Lynn Haley, CITY OF INDIANAPOLIS, CORPORATION COUNSEL, Indianapolis, IN; Justin F. Roebel, CITY OF INDIANAPOLIS, OFFICE OF CORPORATION COUNSEL, Indianapolis, IN.

For MARION COUNTY PROSECUTOR, in his official capacity, JOHNSON COUNTY PROSECUTOR, in his official capacity, Defendants: Adam Clay, INDIANA ATTORNEY GENERAL, Indianapolis, IN; Betsy M. Isenberg, Scott Leroy Barnhart, INDIANA OFFICE OF THE ATTORNEY GENERAL, Indianapolis, IN; Tamara Weaver, INDIANA ATTORNEY GENERAL, Indianapolis, IN; Wade Dunlap Fulford, [*2] Indiana Attorney General, Indianapolis, IN.

For CITY OF FRANKLIN, Defendant: Robert Howard Schafstall, CUTSINGER & SCHAFSTALL, Franklin, IN.

For JOHNSON COUNTY SHERIFF, in his official capacity, Defendant: William W. Barrett, WILLIAMS HEWITT BARRETT & WILKOWSKI LLP, Greenwood, IN.

For Amicus Curiae United Mexican States, Hughes Socol Piers Resnick & Dym, Ltd., Amicus: Jose J. Behar, Joshua Karsh, Matthew J. Piers, PRO HAC VICE, HUGHES SOCOL PIERS RESNICK & DYM, LTD., Chicago, IL.

JUDGES: SARAH EVANS BARKER, United States District Judge.

OPINION BY: SARAH EVANS BARKER

OPINION

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction [Docket No. 14], filed on May 26, 2011, pursuant to *Federal Rule of Civil Procedure 65* in the above-captioned cause. Plaintiffs seek to have enjoined without bond two provisions of the recently enacted Senate Enrolled Act 590, scheduled to go into effect on July 1, 2011. Specifically, the two portions of that law which Plaintiffs challenge are: Section 19 of SEA 590, which amends *Indiana Code § 35-33-1-1(a)(1)*, by adding new *sections (a)(11)-(a)(13)*, authorizing state and local law enforcement officers to make [*3] a warrantless arrest of a person when the officer has a removal order issued for the person by an immigration court, a detainer or notice of action issued for the person by the United States Department of Homeland Security, or has probable cause to believe the person has been indicted for or convicted of one or more aggravated felonies. Plaintiffs also challenge Section 18 of SEA 590, to be codified as Indiana Code § 34-28-8.2, which creates a new infraction under Indiana law for any person (other than a police officer) who knowingly or intentionally offers or accepts a consular identification card as a valid form of identification for any purpose.

The legislation under review here, as adopted by the Indiana General Assembly, mirrors a spate of similar laws recently enacted (and challenged in their respective courts) by the states of Alabama, Georgia, South Carolina, Utah and Arizona. Regarding each of these statutes, the ostensible underlying purpose is the same: all represent attempts by the states to offset in various ways difficulties that have arisen within their jurisdictions from the perceived failures of the federal government to deal more effectively with the broad problem [*4] of illegal immigration. In their attempts to fashion laws to advance this purpose, these states have tended to impose a variety of restrictions on immigrants -- some in this country legally, some not -- and on businesses who would hire them or conduct other commercial affairs with such persons located or otherwise living within their borders. Tacitly acknowledging that immigration matters are primarily committed to the federal government to regulate, the states' enactments reflect what in some instances appear to be tortuous attempts to carve out legally permissible roles that do not run afoul of federal jurisdictional and constitutional requirements as well as the principles of federal preemption. Unfortunately, insofar as Indiana's efforts to carve out such a permissible role, at least with regard to the two sections of the statute under review here, their results have proven to be seriously flawed and generally unsuccessful.

Plaintiffs' Complaint challenges the constitutionality of these two sections of SEA 590. Their accompanying

Motion for Preliminary Injunction seeks to have the Court enjoin the State of Indiana from enforcing them until a final determination can be made by the [*5] Court both as to their constitutionality, arguing that the challenged sections are not only unconstitutional under the *Fourth Amendment* and due process provisions, and because they run afoul of federal presumption principles as attempts to regulate immigration, an exclusively federal concern. Oral arguments were heard on June 20, 2011. Having considered the parties' briefing and oral arguments, the undisputed documentary evidence, and the controlling principles of law, the Court now GRANTS Plaintiffs' motion for injunctive relief.

Factual Background

I. Federal Immigration Regulation

In 1952, Congress enacted the Immigration and Nationality Act ("INA"), 66 Stat. 163, as amended, *8 U.S.C. § 1101 et seq.* "That statute established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Chamber of Commerce of U.S. v. Whiting, 131 S.Ct. 1968, 1973, 179 L. Ed. 2d 1031, 1043 (2011)* (quoting *De Canas v. Bica, 424 U.S. 351, 353, 359, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976)).* The INA empowers the Department of Homeland Security ("DHS"), the Department of Justice ("DOJ"), and the Department of State, [*6] among other federal agencies, to administer and enforce immigration law. Within DHS, various sub-agencies, including the United States Immigration and Customs Enforcement ("ICE"), the United States Customs and Border Protection ("CBP"), and the United States Citizenship and Immigration Services ("USCIS"), are involved in this task.

[HN1] In certain limited situations, federal law permits the delegation of authority to enforce civil immigration law to state and local law enforcement. For example, DHS is permitted to enter into written agreements (known as "287(g) agreements") with states or any political subdivision of a state to allow appropriately trained and supervised officers or employees of the state or subdivision to perform certain immigration responsibilities. *8 U.S.C. § 1357(g)(1).* It is undisputed that Indiana has no such agreement with the federal government.

II. Section 19

Section 19 of the Act amends *Indiana Code § 35-33-1-1(a)(1),* by adding new [HN2] *sections (a)(11)-(a)(13),* which provide as follows:

> (a) A law enforcement officer may arrest a person when the officer has:
>
> ***
>
> (11) a removal order issued for the person by an immigration court;
>
> (12) a detainer or notice of action for the person [*7] issued by the United States Department of Homeland Security; or
>
> (13) probable cause to believe that the person has been indicted for or convicted of one (1) or more aggravated felonies (as defined in *8 U.S.C. 1101(a)(43)*).

An understanding of the material phrases incorporated in this statute is necessary; that discussion ensues:

A. Removal Order

[HN3] The INA contains provisions which, *inter alia,* set forth the conditions under which a foreign national may be admitted to and remain in the United States, establish civil penalties and criminal sanctions for immigration violations, and grant DHS the discretion to place non-citizens into removal proceedings for various actions. See, e.g., *8 U.S.C. §§ 1181-1182, 1184, 1225, 1227-1229, 1306, 1324-25.* Unlawful presence in the United States on its own is not a federal crime, although it can lead to the civil remedy of removal. *8 U.S.C. §§ 1182(a)(6)(A)(I), 1227(a)(1)(B), (C).* Removal proceedings take place within an administrative immigration court system within the DOJ. *8 C.F.R. § 1003.0, et seq.*

[HN4] If the Attorney General of the United States issues a warrant after removal proceedings have been initiated against an individual under federal law, that person [*8] may be arrested and detained pending a final removal decision. *8 U.S.C. § 1226(a).* However, removal does not occur in every case. After removal proceedings are initiated, the noncitizen may still be released during the pendency of removal proceedings, or even after the removal order has been issued by an immigration judge. Under *8 U.S.C. § 1226(a),* the individual may be released on bond or conditional parole, or, in some cases, be provided with work authorization. Id. *§ 1226(a)(3).* After a removal order is issued by an immigration judge, the non-citizen has the right to seek reconsideration as well as administrative and judicial review

of that determination and may be released on bond until a final determination is made. *8 U.S.C. § 1229a(c)(5)*. Even after issuance of a final removal order, the individual may, in some circumstances, move to reopen the removal proceedings, which may stay his/her removal pending final disposition of the motion. Id. *§ 1229a(c)(7)*. If the Attorney General fails to remove the non-citizen within ninety days after the removal order becomes final, the individual is released from detention, subject to supervision by the Attorney General. *8 U.S.C. § 1231(a)(3)*. [*9] Finally, in lieu of deportation, the Attorney General may allow an alien to voluntarily depart the United States during a predetermined period of time. *8 U.S.C. § 1229c*.

B. Detainer

[HN5] If federal or local law enforcement informs ICE that an alien is in custody on non-immigration related charges, ICE may issue a detainer requesting that the law enforcement agency hold the individual for up to 48 hours (not including weekend days and holidays) beyond the time that the detainee would otherwise be released in order to allow ICE to assume custody, if it chooses to do so. *8 C.F.R. § 287.7(d)*. A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency "advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody." Id. *§ 287.7(a)*. The detainer automatically expires at the end of the 48-hour period. Id.

C. Notice of Action

The standard form that federal immigration authorities utilize to inform individuals with pending petitions of any sort before the agency of the status of their cases is known as the Notice of Action Form, Form I-797. This form may be used to notify a person of a wide variety of administrative actions, including [*10] that a petition or application with the agency has been received, that a decision has been made on a petition or application, and may even be used to notify an individual that he or she has been granted lawful status. Because an I-797 form is essentially simply a communication between the agency and the petitioner issued for a wide range of administrative reasons, receipt of a notice of action is not a reliable indicator of an individual's immigration status, or whether an individual has engaged in illegal activity, or the circumstances surrounding the individual's presence in the United States.

D. Aggravated Felonies

[HN6] The INA provides that an alien convicted of an "aggravated felony" is subject to removal and may not receive asylum in the United States, become a citizen, lawfully reenter the United States, or have removal orders cancelled by the Attorney General. *8 U.S.C. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(I); 1227 (a)(2)(A)(iii); 1229b(a)(3)*. However, it is often unclear whether a particular crime constitutes an aggravated felony under federal immigration law. "Aggravated felony" is defined under *8 U.S.C. § 1101(a)(43)*, which encompasses 21 subsections, many of which themselves contain [*11] multiple crimes. Thus, determining whether a particular crime meets the definition is a complex analytical undertaking, one with which many courts routinely grapple as have Executive Branch agencies and departments charged with enforcing this law.

III. Section 18

Section 18 of the Act, to be codified as [HN7] Indiana Code § 34-28-8.2, provides:

> Chapter 8.2. Offenses Related to Consular Identification
>
> Sec. 1. As used in this chapter, "consular identification" means an identification, other than a passport, issued by the government of a foreign state for the purpose of providing consular services in the United States to a national of the foreign state.
>
> Sec. 2. (a) This section does not apply to a law enforcement officer who is presented with a consular identification during the investigation of a crime.
>
> (b) Except as otherwise provided under federal law, a person who knowingly or intentionally offers, accepts, or records a consular identification as a valid form of identification for any purpose commits a Class C infraction. However, the person commits:
>
> (1) a Class B infraction for a second offense; and
>
> (2) a Class A infraction for a third or subsequent offense.

Consular Identification Documents ("CIDs"):

[HN8] The [*12] Vienna Convention on Consular Relations ("VCCR"), to which the United States is a signatory, provides, *inter alia*, that a foreign consulate may

issue travel documents, visas, or other appropriate documents to protect and assist its citizens in the foreign country. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Art. 5(a), (d), (e), *T.I.A.S. No. 6820, 21 U.S.T. 77, 1969 WL 97928 (Dec. 14, 1969)*. Consular identification documents ("CIDs") are photo identification cards issued by many embassies and consulates, including the United States, "to encourage their citizens abroad to register with the consulates so that they can receive standard consular services, be notified if necessary, and be located upon inquiry by relatives and authorities." Congressional Research Service, Consular Identification Cards: Domestic and Foreign Policy Implications, the Mexican Case, and Related Legislation at CRS-1 (2005), available at http://www.fas.org/sgp/crs/misc/RL32094.pdf. The Court has been informed that the issuance of these identification documents is a matter which the respective foreign governments closely supervise and tightly manage.

[HN9] Under the VCCR, a foreign national [*13] arrested or detained in the United States must be advised of his or her right to request that appropriate consular officials be timely notified of the individual's detention. Thus, individuals can use CIDs to alert federal, state, and local law enforcement authorities of the need to notify consular officials when assistance is required. Cardholders also commonly use CIDs for identification purposes, such as with financial institutions, law enforcement agencies, and state and local governments in the United States, as well as for other transactions that require photo identification, including cashing checks, renting housing, or enrolling children in school, especially when no other forms of photo identification are available to them for their use.

The parties stipulate that limitations or restrictions on the use of these documents in connection with official state matters is a permissible exercise of state governmental authority. As for the non-state governmental uses, however, the parties here disagree as to their lawfulness.

IV. Background on the Named Plaintiffs

Ingrid Buquer is a Mexican citizen who resides in Johnson County (Indiana) and also spends a significant amount of time in [*14] Marion County. She has applied for a U-Visa as a victim of, or a witness to, a violent crime, which, if granted, will allow her to remain in the United States. See *8 U.S.C. § 1101(a)(15)(U)*. She has received an I-797 Notice of Action to inform her of the pendency of her U-Visa application. Ms. Buquer has also received a CID from the Mexican Consulate in Indianapolis, which she uses in both Johnson and Marion Counties for many purposes, such as banking and shopping as well as in other situations in which identification is required. She has at times presented her CID when receiving services at the Mexican Consulate as proof of her Mexican citizenship. Ms. Buquer testified by affidavit that she is unable to obtain an identification card or license from the State of Indiana. Buquer Aff. ¶ 8. Plaintiffs contend that, because Ms. Buquer has received a Notice of Action, she will be subject to warrantless arrest pursuant to Section 19 when and if the law goes into effect on July 1, 2011. Additionally, under Section 18, effective July 1, 2011, she will not be able to use her CID for identification without being subject to a civil infraction.

Louisa Adair is a citizen of Nigeria who currently [*15] resides in Marion County. Ms. Adair had a removal order issued against her in 1996, but she is currently released by ICE on an Order of Supervision, under which she reports to ICE every six months. She has been issued a valid work authorization document from DHS and she receives a I-797 Notice of Action each time she applies to renew her employment authorization card. Ms. Adair has filed a Motion to Reopen and Terminate Removal Proceedings and has also made a formal request that the ICE Chief Counsel's office exercise its prosecutorial discretion and join in her in that motion. If her request is granted, she will be eligible to apply for lawful permanent residency because her mother is a citizen of the United States and Ms. Adair possesses an approved and current I-130 visa petition. Ms. Adair also received an I-797 Notice of Action approving the I-130 petition that establishes her relationship to her citizen-mother. Plaintiffs contend that, because Ms. Adair has received both a removal order and various Notice of Action forms, she will be subject to warrantless arrest by Indiana law enforcement officers when and if Section 19 goes into effect on July 1, 2011.

Berlin Urtiz is a citizen [*16] of Mexico who currently resides in Marion County. He has been a lawful permanent resident of the United States since 2001. In 2004, Mr. Urtiz was convicted of theft in Johnson County and sentenced to two years in prison, which was subsequently suspended to probation. This crime was initially determined to be an aggravated felony under *8 U.S.C. § 1101(a)(43)*, and, in 2010, he was taken into custody by ICE and detained for four months pending removal. However, in September 2010, he was granted post-conviction relief. His theft conviction was vacated in November 2010 and he was re-sentenced for the misdemeanor offense of conversion, which does not qualify as an aggravated felony. Currently, there are no removal proceedings pending against Mr. Urtiz and he remains a lawful permanent resident, but Plaintiffs contend that, inasmuch as he has been convicted of an aggravated felony in the past, he will be subject to warrantless arrest

by Indiana law enforcement officers on this basis when and if Section 19 goes into effect on July 1, 2011.

Legal Analysis

I. Standard of Review

[HN10] The grant of injunctive relief is appropriate if the moving party is able to demonstrate: (1) a reasonable likelihood [*17] of succeeding on the merits; (2) irreparable harm if preliminary relief is denied; and (3) an inadequate remedy at law. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc., 549 F.3d 1079, 1086 (7th Cir. 2008)*. If the moving party fails to demonstrate any one of these three threshold requirements, the emergency relief must be denied. Id. However, if these threshold conditions are met, the Court must then assess the balance of harm -- the harm to Plaintiffs if the injunction is not issued against the harm to Defendant if it is issued -- and, where appropriate, also determine what effect the granting or denying of the injunction would have on nonparties (the public interest). Id.

[HN11] In determining whether to grant injunctive relief, the district court must take into account all four of these factors and then "exercise its discretion 'to arrive at a decision based on the subjective evaluation of the import of the various factors and a personal, intuitive sense about the nature of the case." Id. (quoting *Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429, 1436 (7th Cir. 1986)*). This process involves engaging in what is called the "sliding scale" approach, [*18] meaning that "the more likely it is the plaintiff will succeed on the merits, the less balance of irreparable harms need weigh toward its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side." *Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992)* (citations omitted). The sliding scale approach "is not mathematical in nature, rather 'it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.'" *Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 895-96 (7th Cir. 2001)* (quoting *Abbott Laboratories, 971 F.2d at 12*).

II. Likelihood of Success on the Merits

A. Section 19

1. Standing

Defendants initially contend that all three named Plaintiffs lack standing to sue, having failed to show that they are under threat of suffering any injury because they have failed to establish with certainty that they will be subject to arrest under Section 19 when and if it becomes effective. [HN12] To have standing to seek injunctive relief, "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; [*19] the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Institute, 555 U.S. 483, 555 U.S. 488, 129 S.Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009)* (citing *Friends of Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000))*.

Mr. Urtiz: Defendants argue that Mr. Urtiz lacks standing to challenge the constitutionality of Section 19 because he has neither been indicted for nor convicted of an aggravated felony as Plaintiffs allege.[1] Specifically, Defendants contend that, because all but two days of Mr. Urtiz's court-ordered two-year sentence in the Indiana Department of Correction was suspended to probation, he fails to meet the one-year minimum term of imprisonment required for a theft offense to constitute an aggravated felony under *8 U.S.C. § 1101(a)(43)*. However, the applicable federal statute defines "term of imprisonment" to include "the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence* [*20] *in whole or in part.*" *8 U.S.C. § 1101(a)(48)(B)* (emphasis added). This definition applies regardless of whether the conviction was entered before, on, or after September 30, 1996, the effective date of the INA. *8 U.S.C. § 1101(a)(43)*. Thus, Mr. Urtiz's two-year sentence exceeds the one-year threshold required for a theft conviction to constitute an aggravated felony, notwithstanding the fact that nearly the entire sentence was suspended to probation.

> 1 As laid out above, pursuant to *Indiana Code § 35-33-1-1(a)(13)*, a law enforcement officer may arrest a person when the officer has "probable cause to believe that the person has been indicted for or convicted of one (1) or more aggravated felonies (as defined in *8 U.S.C. § 1101(a)(43)*)."

Defendants also argue that Mr. Urtiz does not fall within the terms of Section 19's proscriptions for the additional reason that his conviction for an aggravated felony was subsequently vacated and reduced to a misdemeanor. However, [HN13] Section 19 specifically authorizes the arrest of anyone for whom an officer has probable cause to believe "*has been* ... convicted of one (1) or more aggravated felonies." *IND. CODE § 35-33-1-1(a)(13)* (emphasis added). As Plaintiffs [*21] note, the use of the past participle in the statute implies that this provision applies as long as the individual was

convicted at any time in the past. Section 19 makes no distinctions as to convictions that are later overturned or expunged. Clearly, whenever the Indiana General Assembly has sought to have the term "conviction" exclude convictions that have been reversed or vacated, it has made that intention clear. See, e.g., *IND. CODE 3-8-1-5(b)* (convictions that have been reversed, vacated, or set aside do not qualify for statute disqualifying a person convicted of a felony from assuming or being a candidate for elected office). For these reasons, we find that Mr. Urtiz will be subject to arrest under *§ 35-33-1-1(a)(13)* when and if Section 19 becomes effective.

Ms. Adair and Ms. Buquer: Ms. Adair has received a removal order from immigration. Defendants argue that Ms. Adair nonetheless lacks standing to challenge *Indiana Code § 35-33-1-1(a)(11)*, which allows an officer to arrest an individual for whom a removal order has been issued by an immigration court, because her removal order was subsequently "superseded" by an Order of Supervision. Defendants' characterization is in error, [*22] however, because, rather than superseding a removal order, an order of supervision is issued "pending removal" and merely imposes conditions on an individual's release in cases where the person neither leaves nor is removed within the statutory period. See *8 U.S.C. § 1231(a)(3)*. Thus, although Ms. Adair has received an order of supervision, there is no evidence that her removal order is no longer current and in-force. Accordingly, she meets the definition of individuals who are subject to arrest under *§ 35-33-1-1(a)(11)*, since she has "a removal order issued for [her] by an immigration court."

Defendants argue that neither Ms. Adair nor Ms. Buquer has standing to challenge *Indiana Code § 35-33-1-1(a)(12)* because the notices of action that they each received are "benign" and further, the Court must assume that Section 19 would only be enforced against those with "non-benign" notices of action.[2] However, *§ 35-33-1-1(a)(12)* permits the arrest of any person who has a "notice of action ... issued by the United States Department of Homeland Security," making no distinction between benign and nonbenign notices nor does the statute (or Defendants for that matter) indicate what constitutes a [*23] non-benign notice of action. It is undisputed that both Ms. Adair and Ms. Buquer possess notices of action issued by DHS and nothing in the plain language of the statute excludes their notices of action from inclusion within the terms of Section 19. Thus, we find that both Ms. Adair and Ms. Buquer will be subject to arrest when and if Section 19 becomes effective on July 1, 2011 sufficient to satisfy the requirements of standing.

2 The terms "benign" and "non-benign" do not appear in the statute; their use here reflects the adversarial effort by defense counsel to salvage their standing arguments.

It is true that none of the Plaintiffs has yet suffered a direct injury based on Section 19 because, obviously, the statute is not yet in effect. However, it is well established that [HN14] "the existence of a statute implies a threat to prosecute [and thus] pre-enforcement challenges are proper, because a probability of future injury counts as 'injury' for the purpose of standing." *Bauer v. Shepard, 620 F.3d 704, 708 (7th Cir. 2010)* (citations omitted). Interestingly, Defendants have argued that the authorizations given police officers to effect arrests of persons under these provisions may never [*24] be enforced, suggesting that Plaintiffs are thus not at risk or otherwise injured until such time as they are actually arrested. We reasonably assume that the Indiana General Assembly intended this law to be enforced in accordance with its authorizations when it was enacted. Accordingly, because Plaintiffs have established that they fall within the definition of those individuals who will be subject to arrest if and when Section 19 becomes effective on July 1, 2011, their standing to bring this action seeking injunctive relief has been established.

2. Ripeness

In related fashion, Defendants maintain that Plaintiffs' challenge to Section 19 is not ripe for adjudication. Defendants argue that Plaintiffs are unable to point to a specific threat of the application of the Act, and, because the nature and scope of its application have not yet been developed, any determination by the Court regarding its constitutionality would be premature.

[HN15] To determine whether a case is ripe for adjudication, a court must determine "first, whether the relevant issues are sufficiently focused so as to permit judicial resolution without further factual development; and second, whether the parties would suffer [*25] any hardship by the postponement of judicial action." *Triple G Landfills, Inc. v. Bd. of Comm'rs of Fountain County, Ind., 977 F.2d 287, 289 (7th Cir. 1992)* (citations omitted). The first factor is generally met where "[t]he issues posed are purely legal ... and would not be clarified by administrative proceedings or any other type of factual development." Id. The parties here agree that, at least at the preliminary injunction stage, the *Fourth Amendment* and preemption issues presented to the Court are purely legal rather than factual issues. Accordingly, this first factor is met.

Plaintiffs argue that the second factor is also met because, absent judicial action, they face the threat of arrest when and if Section 19 becomes effective on July

1, 2011. Defendants rejoin that, because the scope and application of Section 19 has not yet been developed, Plaintiffs' assertion that they will be subject to arrest is nothing more than speculation based on the assumption that a non-party (a state or local law enforcement officer) will perform a wholly discretionary act, to wit, the arrest of one of the Plaintiffs, based solely on the authority granted by Section 19.

Courts have long upheld pre-enforcement [*26] challenges to various civil and criminal statutes despite the fact that the discretionary authority of government officials is present in virtually all such statutes, and it is well-established that [HN16] a plaintiff need not be required to undergo arrest and prosecution before being able to challenge the constitutionality of a statute. See, e.g., *Babbit v. UFW Nat'l Union, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)* ("[O]ne does not have to await the consummation of a threatened injury to obtain preventive relief.") (citation and quotation omitted); *Steffel v. Thompson, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)* ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 687 (7th Cir. 1998)* ("It is not necessary ... that a plaintiff expose itself to actual arrest or prosecution.").

As long as there is a credible threat of enforcement, the second prong of the ripeness doctrine is satisfied. Such a threat is credible "when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to [*27] indicate affirmatively that it will *not* enforce the statute." *Commodity Trend Serv., 149 F.3d at 687* (citing *Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)* (emphasis in original)). Here, for the reasons deemed applicable to resolving the standing issue, Plaintiffs have shown that they fall within the ambit of those who will be subject to arrest under Section 19. Moreover, neither party has pointed to evidence to establish, nor is there anything in the statute or legislative history to suggest, that Section 19 will not be enforced as written.

This case is distinguishable from the circumstances presented in *Indiana Right to Life, Inc. v. Shepard, 507 F.3d 545 (7th Cir. 2007)*, where the Seventh Circuit held that the issues presented were not ripe for adjudication because there was no evidence of a real threat of enforcement of the challenged provisions. In that case, the plaintiffs were able to point to evidence that the provisions at issue had never been enforced in the ten years of their existence. No similar evidence has been presented here to show that Section 19, having now been enacted, will not be enforced. Given the concerns and purposes underlying this [*28] statute and informing the decision of the Indiana General Assembly to enact this law and in light of the heightened political rhetoric accompanying public debates on issues of immigration policy across Indiana and elsewhere, it is reasonable to assume that, armed with these new and expanded powers, state law enforcement officials will undertake to enforce them. Accordingly, we find that Plaintiffs have alleged an actual and credible fear that Section 19 will be enforced against them, should the statute become effective on July 1, 2011. For these reasons, we hold that Plaintiffs' challenge is ripe for adjudication.

3. *Fourth Amendment* and Due Process Issues

Section 19 authorizes state and local law enforcement officers to effect warrantless arrests for matters that are not crimes. Defendants concede that nothing under Indiana law makes criminal the receipt of a removal order, a notice of action or detainer, or a person's having been indicted for or convicted of an aggravated felony. Defs.' Resp. at 12. Defendants also concede that arrests based solely on Section 19 "could potentially be in violation of the *Fourth Amendment*." Id. at 3. Nevertheless, Defendants argue that, because Plaintiffs [*29] have raised a facial challenge to the statute, the Court must presume that government officials will apply Section 19 in a constitutional manner.

[HN17] "[A]n arrest is reasonable under the *Fourth Amendment* so long as there is probable cause to believe that *some* criminal offense has been or is being committed." *Fox v. Hayes, 600 F.3d 819, 837 (7th Cir. 2010)* (emphasis in original) (citations omitted). It is true that, "'[i]n evaluating a facial challenge to a state law, a federal court must ... consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism, 491 U.S. 781, 795-96, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)* (quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982))*. However, "a federal court may not slice and dice a state law to 'save' it; we must apply the Constitution to the law the state enacted and not attribute to the state a law we could have written to avoid the problem." *K-S Pharmacies, Inc. v. American Home Products, Corp., 962 F.2d 728, 730 (7th Cir. 1992)* (citations omitted). Here, Defendants maintain that the Court is obligated to presume that the arrest provisions set forth in Section 19 would be applied constitutionally, [*30] that is, in accordance with the *Fourth Amendment* and due process requirements, and thus that these expanded arrest powers would be utilized only in conjunction with an otherwise lawful arrest.

We find this interpretation entirely fanciful, however, given that it completely ignores the plain language of

the statute. [HN18] Section 19 expressly provides that state and local enforcement officers "may arrest" individuals for conduct that all parties stipulate and agree is not criminal. The statute contains no reference to *Fourth Amendment* protections nor does it include a requirement that the arrest powers granted to law enforcement officers under Section 19 be used only in circumstances in which the officer has a separate, lawful reason for the arrest. Moreover, accepting Defendants' proposed construction would, in effect, read the statute out of existence. Apart from the exclusion of *Fourth Amendment* requirements regarding probable cause to arrest, Section 19 bestows no authority on law enforcement officers beyond the power to arrest for the noncriminal conduct enumerated therein, leaving a deafening silence as to what happens to the arrestee post his arrest. There is no mention of any requirement [*31] that the arrested person be brought forthwith before a judge for consideration of detention or release. There is in fact a complete void within the new statute regarding all other due process protections. Our acceptance of Defendants' theory, based on their seemingly desperate effort to save it, would be to require the Court to construe it contrary to its plain language, which clearly authorizes law enforcement officials to arrest an individual without regard to whether that individual was already subject to a lawful arrest. Such an interpretation, apart from being based on nothing within the text of the statute itself, would render Section 19 completely meaningless. We cannot and shall not interpret a statute in such an unprincipled fashion. *United States v. Berkos, 543 F.3d 392, 396 (7th Cir. 2008).*

In short, if the Court were to accept Defendants' proposed construction of the arrest powers provision, it would entail a radical rewriting of Section 19, which the Court is not empowered to do. Even if such broad interpretive powers were possible, the construction Defendants have proposed would be entirely untenable because, as we have noted above, it would render the challenged statute [*32] meaningless. Accordingly, we find that Plaintiffs have established that they are likely to succeed on the merits of their claim that Section 19 is susceptible to only one interpretation, to wit, that it authorizes the warrantless arrest of persons for matters and conduct that are not crimes. Because such power contravenes the *Fourth Amendment*, Section 19 would be unconstitutional.[3]

> 3 Defendants make a passing argument that it is as yet undetermined whether the *Fourth Amendment* even applies to undocumented aliens. However, we read the caselaw to say otherwise. Following the Supreme Court's decision in *Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984)*, in which the Court accepted the principle that the *Fourth Amendment* does apply to undocumented individuals, courts, including the Seventh Circuit, routinely apply the *Fourth Amendment* in cases involving undocumented aliens. See, e.g., *United States v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010)*; *United States v. Villegas, 495 F.3d 761 (7th Cir. 2007).*

4. Preemption

Plaintiffs are also likely to succeed in establishing that Section 19 is preempted by federal law. [HN19] By virtue of the *Supremacy Clause*, it is "[a] fundamental [*33] principle of the Constitution ... that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)* (citations omitted). Preemption, express or implied, "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977)* (citations omitted). In cases in which Congress has not explicitly provided for preemption in a given statute, state law must still yield in two circumstances. First, "[w]hen Congress intends federal law to 'occupy the field,' state law in that area is preempted." *Crosby, 530 U.S. at 372.* Even if Congress has not occupied the field, state law is preempted as well where it conflicts with federal law. Conflicts arise when "compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)* (internal quotations and citations omitted). To determine whether "obstacle" preemption exists, a court [*34] must employ its "judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby, 530 U.S. at 373.*

Defendants argue that Section 19 is not preempted because it does not constitute a regulation of immigration or a usurpation of federal authority, but merely "provides guidance to law enforcement officers as to when they 'may' arrest," giving "Indiana officers the discretion to assist federal enforcement of immigration laws." Defs.' Resp. at 15. However, Defendants have failed to point to any authority allowing states to *sua sponte* assist the federal government in enforcing immigration laws nor is there evidence that Indiana has entered into a 287(g) agreement with the federal government that might allow it to render such assistance. Moreover, the guidance the statute provides authorizes state and local law enforcement to arrest in circumstances far broader than those in which Congress has allowed state and local officers to

arrest immigrants, (*8 U.S.C. § 1252c*),[4] and, in fact, authorizes a much broader warrantless arrest power than even federal officers are given under federal law. *8 U.S.C. § 1357(a)(2)*.[5] We are not aware [*35] of nor has either party pointed to an INA provision indicating that Congress intended state and local law enforcement officers to retain greater authority to effectuate a warrantless arrest than federal immigration officials.

4 Pursuant to *8 U.S.C. § 1252c*, state and local officers are given the authority, "to the extent permitted by relevant State and local law," to arrest and detain an individual who:

> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,
>
> but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

5 Under *8 U.S.C. § 1357(a)(2)*, federal officers are authorized to arrest without a warrant any alien:

> who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating [*36] the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.

It is true that state laws addressing legitimate local interests that only indirectly touch on immigration matters are not preempted. See *DeCanas, 424 U.S. at 355-57* (superseded by statute on other grounds). Here, however, Defendants have failed to identify a specific state or local interest that is addressed by allowing the warrantless arrest (without any instructions as to what is to happen with the arrestee thereafter) of any individual who has received a detainer order, a notice of action, or a removal order from the federal government or who has ever been indicted for or convicted of an aggravated felony, none of which necessarily indicates that the individual is subject to federal [*37] detention. Far from having an indirect impact on immigration, it is reasonable to predict that many such arrests authorized under Section 19 will be in direct contravention of "the carefully calibrated scheme of immigration enforcement that Congress has adopted." *United States v. Arizona, F.3d , 2011 U.S. App. LEXIS 7413, 2011 WL 1346945, at *17 (9th Cir. Apr. 11, 2011)*.

For example, Section 19 authorizes arrest for any individual in receipt of a removal order. However, having a prior removal order is not proof that the person is subject to detention by federal authorities. In Ms. Adair's situation, although she has a removal order issued by the federal government, with the permission of federal authorities she has been permitted to remain free from custody and to obtain work authorization. In such circumstances where the federal government has exercised its discretion to release an individual like Ms. Adair, who has had a removal order issued, the subsequent arrest of that person by Indiana law enforcement officers directly conflicts with the federal decision, obviously and seriously interfering with the federal government's authority in the field of immigration enforcement.

The conflict is even more apparent [*38] with regard to Section 19's authorization for arrest of individuals who have been issued a notice of action. Notices of action are inherently non-criminal and receipt of such a form generally merely acknowledges that the individual's information dealing with immigration matters has been received by INS or that an immigration decision has been made. Such communications could be as innocuous as informing the recipient that a visa application has been received and is being processed or even that he or she has attained lawful alien status. Although Defendants

argue that it should be presumed that state and local law enforcement officers would utilize their arrest powers only in cases where the notice of action received is "substantive" or "non-benign," no such limitation appears in Section 19 nor are those terms defined, leaving to anyone's guess what would constitute a "non-benign" or "substantive" notice of action or how any Indiana law enforcement officer could be expected to know the basis for such a distinction. Clearly, it is not the intent or purpose of federal immigration policy to arrest individuals merely because they have at some point had contact with an administrative agency [*39] about an immigration matter and received notice to that effect. Authorizing an arrest for nothing more than the receipt of an administrative notification plainly interferes with the federal government's purpose of keeping those involved in immigration matters apprised of the status of their cases, *but not arresting* them.

[HN20] Federal law specifies that the immigration penalties associated with aggravated felonies arise only if the individual has been *convicted* of the offense. *8 U.S.C. § 1101(a)(43).* Yet Section 19 allows state and local law enforcement to arrest those who they have probable cause to believe have merely been *indicted* for such an offense. Considering that the determination of whether a crime constitutes an aggravated felony is often such a complex and confusing undertaking, and that there is no guidance in Section 19 as to how a state or local officer should make that determination, the power to arrest on that basis threatens serious abuses. Regardless, authorizing the arrest of individuals who have been indicted but not yet convicted of an aggravated felony runs counter to the federal intent to limit such penalties. Even in cases where there has been a conviction covered [*40] under Section 19, if the federal government fully resolves the issue of the alien's conviction and determines that no penalty will be imposed, a subsequent arrest by state authorities directly conflicts with the federal determination. That is the harm posed Mr. Urtiz.

Federal immigration law consists of a myriad of provisions together creating a balance between competing regulatory and policy objectives. In order to maintain that balance throughout the country, federal law vests discretion at the federal level regarding whether and which persons without full, lawful alien status should be arrested. However, Section 19 alters that balance by authorizing the arrest for immigration matters of individuals within the State of Indiana only whom, in many cases, the federal government does not intend to be detained. As such, Section 19 interferes with federal discretion relating to priorities for immigration enforcement and the best methods for carrying out those enforcement responsibilities. For these reasons, we find that Plaintiffs have established a likelihood of ultimately prevailing on the merits of their claim that Section 19 is preempted by federal law.

B. Section 18

1. Standing

Defendants [*41] contend that Ms. Buquer does not have standing to challenge the constitutionality of Section 18 because there is no evidence that she is unable to obtain a valid identification card from the State of Indiana or that, in fact, she has even attempted to do so, thereby failing to establish that she will be subject to Indiana Code § 34-28-8.2. However, Ms. Buquer testified by affidavit that she is unable to obtain an identification card or a driver's license from the State of Indiana because she does not possess any of the requisite documents for doing so. Buquer Aff. ¶ 8; Buquer Supp. Aff. ¶ 2. Thus, Ms. Buquer has presented sufficient evidence to show that she will be subject to Section 18, if and when it goes into effect on July 1, 2011, which is sufficient to confer standing on her claim.

2. Preemption

Plaintiffs argue that Section 18 interferes with rights bestowed on foreign nations by treaty as well as with the federal government's responsibilities for the conduct of foreign relations, and is thus preempted. Defendants rejoin that the statute does not directly conflict with any treaty nor does it impede the federal government's ability to manage foreign affairs, because Section 18 [*42] is merely an internal regulation outlining acceptable forms of identification within the State of Indiana that does not single out or conflict with any identifiable immigration policy or regulation.

Issuing CIDs is one of the prerogatives of a foreign government that is protected by the Vienna Convention of Consular Relations ("VCCR"), to which the United States is a signatory. Defendants maintain that Section 18 does not conflict with the VCCR because it does not prevent a consulate from issuing a CID or from accepting a CID at the consulate itself. It is true that Section 18 does not prohibit a foreign government from issuing CIDs to its citizens, and thus does not directly conflict with the VCCR. However, while Section 18 does not prohibit a consulate from issuing CIDs, it in essence makes their issuance meaningless as it prohibits almost every use for which the documents are ordinarily issued, including for identification purposes in private commercial transactions that are conducted between private parties. In light of this drastic limitation imposed by Section 18, we are unable to dismiss the statute's impact as inconsequential. Rather, it appears that the statute directly interferes [*43] with rights bestowed on foreign nations by treaty.

It is also clear that such a sweeping prohibition has the potential to directly interfere with executive discretion in the foreign affairs field. [HN21] The executive branch's authority over matters of foreign affairs is an implied constitutional power. *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952)*. "The exercise of the federal executive authority means that state law must give way where ... there is evidence of clear conflict between the policies adopted by the two." *American Ins. Ass'n v. Garamendi, 539 U.S. 396, 421, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003)*. The State Department has in the past cautioned the federal government against taking action against CIDs that might cause other countries to similarly restrict the use and acceptance of such documentation for American citizens abroad.[6] See Testimony of Acting Deputy Assistant Secretary of State Roberta Jackson for the Bureau of Western Hemisphere Affairs, Hearing on the Federal Government's Response to Consular Identification Cards Before the House Subcommittee on Immigration, Border Security, and Claims, House Committee on the Judiciary, 108th Cong. 44-45, at 114 (Jun. 26, 2003).

> 6 The risk that a state [*44] law could result in similar retaliatory actions by foreign governments is no less a concern. The potential impact that Section 18 has on the United States' relationship and dealings with foreign countries is reflected in the concerns raised by Mexico, Brazil, Guatemala, El Slavador, and Colombia in their *amicus curiae* briefs filed in this action.

Additionally, the United States Treasury Department has adopted regulations which, though not requiring financial institutions to accept CIDs and other foreign government-issued documents for identification purposes, allow such entities to do so, and has specifically declined to prohibit financial institutions from relying on particular forms of foreign government-issued identification. See *31 C.F.R. § 1020.220; 68 Fed. Reg. 55335, 55336 (Sept. 25, 2006)*. Thus, while these regulations may not create a direct conflict with Section 18, they are further evidence of the federal government's overarching and legitimate interest in proceeding with caution with regard to regulating the use of CIDs. The State of Indiana's decision to enact a statute which makes it a civil infraction for *anyone* to use CIDs as valid identification for *any* purpose is incompatible [*45] with the federal government's supremacy as well as its deliberately measured approach.

Defendants cite to cases in which courts have found state laws not preempted which deal with matters of traditional state regulation and had only an indirect impact on foreign policy. See *Dunbar v. Seger-Thomschitz, 615 F.3d 574 (5th Cir. 2010)* cert. denied, *131 S. Ct. 1511, 179 L. Ed. 2d 307 (2011)* (holding that Louisiana prescription period applying generally to any challenge of ownership to movable property was not preempted even though the object of the litigation was Nazi-confiscated artwork); *Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d 1 (1st Cir. 2010)* cert. denied, *131 S. Ct. 1612, 179 L. Ed. 2d 501 (2011)* reh'g denied, *131 S. Ct. 2176, 179 L. Ed. 2d 954, 2011 WL 1529816 (U.S. 2011)* (holding that statute of limitations on conversion was statute of general regulation that does not conflict with federal policy). Defendants maintain that, similar to the statutes of general application directed toward matters of state concern, Section 18 "does not single out any identifiable immigration policy or regulation, but rather outlines acceptable forms of identification within the State of Indiana." Defs.' Resp. at 21.

The problem with Defendants' [*46] argument here is that Section 18 is anything but a neutral law of general application that just happens to have a remote and indirect effect on foreign relations. Rather, it targets only one form of identification -- CIDs issued by foreign governments. Moreover, Section 18 regulates CIDs in the broadest possible terms, restricting not just what state agencies may accept as valid identification but prohibiting what identification may be shown and accepted for purely private transactions. "A person," the statute says, and that's all it says. These sweeping regulations, targeted solely at foreign government-issued identification that consulates are, by treaty, entitled to issue, and which restrict the manner in which foreign citizens may travel, live, and trade in the United States have a direct effect on our nation's interactions with foreign nations. Such interactions cannot be dictated or restricted by individual states. For these reasons, we find that, at this preliminary stage, Plaintiffs have established a likelihood of success on the merits of their claim that Section 18 is preempted.

3. Due Process and Equal Protection

Plaintiffs also challenge Section 18 on due process and equal [*47] protection grounds, arguing that the statute is arbitrary and bears no rational relation to legitimate government interests. Defendants rejoin that the statute is rationally related to the legitimate government purpose of ensuring the reliability of identification of individuals within the state and preventing fraud against law enforcement, merchants, and consumers.

[HN22] Under traditional due process and equal protection analysis, state action must be sustained as long as it bears a rational relation to a legitimate governmental interest. *R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 406, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)*. Even under this highly deferential standard of review, we find that Plaintiffs have demonstrated a reasonable likelihood

of success on the merits of their claim that Section 18 is violative of due process and equal protection principles. Although we do not dispute that the stated purpose of ensuring the reliability of identification of individuals within the state and preventing fraud against the *state* is a legitimate governmental purpose, the breadth of the limitation imposed by Section 18, to wit, preventing *any person* (other than a police officer) from either knowingly presenting or accepting [*48] a CID as a valid form of identification *for any purpose* far exceeds its stated purpose and therefore is not rational.

While all parties agree that the State of Indiana has the authority to prohibit the use of various forms of identification, including CIDs, at state agencies, such as the Bureau of Motor Vehicles, Section 18 goes far beyond such regulation to prohibit their use or acceptance in any transaction requiring valid identification, even those between purely private parties who would otherwise be willing to accept CIDs in the context of wholly private transactions. Although Defendants maintain that there has long been a concern regarding the reliability of CIDs, Plaintiffs have presented evidence indicating that they are actually a highly secure form of identification. Upon careful review of the admittedly limited evidence before us given the preliminary stage of this litigation, we are persuaded that CIDs are, at the very least, as reliable as a number of other forms of documentation that individuals are permitted to use for certain identification purposes in Indiana, such as leases, utility bills, and student ID cards. Accordingly, the legislature's decision to single out [*49] for punishment individuals using CIDs for identification purposes from all other individuals, many of whom are using other, arguably more unreliable forms of identification simply does not rationally further the goal of the prevention of fraud or otherwise ensure the reliability of identification. Regrettably in our view, the distinction more accurately appears to have been designed simply to target foreign nationals. As the Supreme Court has recognized, [HN23] "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973).*

II. Irreparable Harm/Inadequate Remedy at Law

Plaintiffs have met their burden on both of these prongs of the preliminary injunction analysis. It is well-established that, [HN24] "'[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'" *Campbell v. Miller, 373 F.3d 834, 840 (7th Cir. 2004)* (quoting *Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984)).* [*50] Moreover, "showing irreparable harm is '[p]robably the most common method of demonstrating that there is no adequate legal remedy.'" Id. (quoting 11A Wright, Miller & Kane, Federal Practice and Procedure § 2944).

III. Balance of Harms

We have already found that Plaintiffs will suffer irreparable harm if a preliminary injunction does not issue. In contrast, Defendants will suffer minimal, if any, harm by allowing the status quo to be maintained pending a final determination in this matter, since these areas addressed by the new and soon to be enjoined state law will remain under federal controls and authority. Thus, the balance of harms weighs clearly in Plaintiffs' favor.

IV. Public Interest

Plaintiffs have also established that a preliminary injunction is in the public interest. It is well-established under controlling Seventh Circuit law that [HN25] "the public has a strong interest in the vindication of an individual's constitutional rights ...." *O'Brien v. Town of Caledonia, 748 F.2d 403, 408 (7th Cir. 1984).* Additionally, as the Ninth Circuit recently recognized in the closely analogous case, *United States v. Arizona, 2011 U.S. App. LEXIS 7413, 2011 WL 1346945, at *19*, it is clearly not in the public interest "'to [*51] allow the state ... to violate the requirements of federal law .... In such circumstances, the interest of preserving the *Supremacy Clause* is paramount.'" Id. (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852-53 (9th Cir. 2009))* (emphasis omitted).

V. Bond

[HN26] *Rule 65(c) of the Federal Rules of Civil Procedure* provides that: "The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." However, the Seventh Circuit has recognized that, "[u]nder appropriate circumstances bond may be excused, notwithstanding the literal language of *Rule 65(c)*." *Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692, 701 (7th Cir. 1977)* (citations omitted). We hold that a bond is not required here, as Defendants are not facing any monetary injury as a result of the issuance of the preliminary injunction.

VI. Conclusion

For the foregoing reasons, we GRANT Plaintiffs' Motion for Preliminary Injunction. Defendants are hereby PRELIMINARILY ENJOINED from enforcing the

following sections of Senate Enrolled Act 590: Section 18, [*52] to be codified as Indiana Code § 34-28-8.2, and Section 19, which amends *Indiana Code § 35-33-1-1(a)(1)*, by adding new *sections (a)(11)-(a)(13)* until further order of this Court. Defendants are hereby further ordered to inform forthwith all the affected Indiana state governmental entities of this injunction.

IT IS SO ORDERED.

Date: 06/24/2011

/s/ Sarah Evans Barker

SARAH EVANS BARKER, JUDGE

United States District Court

Southern District of Indiana

Document 2

Opinion from the Office of the Cook County State's Attorney; dated July 26, 2011; re: Duty to Enforce ICE Detainers

OFFICE OF THE STATE'S ATTORNEY
COOK COUNTY, ILLINOIS
CIVIL ACTIONS BUREAU

ANITA ALVAREZ
STATE'S ATTORNEY

500 RICHARD J. DALEY CENTER
CHICAGO, ILLINOIS 60602
AREA 312-603-5440

July 26, 2011

Honorable Jesus G. Garcia
Commissioner – 7th District
Cook County Board of Commissioners
118 North Clark Street, Room 567
Chicago, Illinois 60602

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

In Re: Duty to Enforce ICE Detainers

Dear Commissioner Garcia:

This letter is in response to your request that this Office render an updated legal opinion regarding the duty to enforce detainers issued by the Bureau of Immigration and Customs Enforcement (ICE).

ISSUE

Whether the duty to enforce ICE detainers is mandatory.

CONCLUSION

Based upon a recently decided federal court decision, ICE detainers are a not akin to a criminal warrant, but rather a voluntary request of a law enforcement agency to cooperate with ICE. It is our opinion that ICE detainers may be treated by the Sheriff as requests for voluntary cooperation, not as orders with which they are required to comply.

DISCUSSION

ICE has the authority to issue a detainer requesting that an inmate be held for a period of time after the completion of a term of imprisonment or release on bail. The regulation found at 8 CFR 287.7 governs ICE detainers and was promulgated pursuant to 8 USC 1227 and 1357 (Sections 236

and 287 of the Immigration and Nationality Act), which authorizes any immigration officer to issue a form I-247, Immigration Detainer, to any other Federal, State or local law enforcement agency. The purpose of ICE detainers are to allow ICE agents time to arrive at the Jail to take into custody a detainee whose immigration status is in question before the detainee is released from the Sheriff's custody. Although the regulations refer to the detainer as a "request," the language in the regulations directed that upon receipt of a retainer, the local law enforcement agency "shall maintain custody of the alien for a period not to exceed 48 hours." 8 CFR 287.7(d). Presumably in reliance on this language, ICE has always publicly suggested that a detainer requires cooperation by the local law enforcement agency.

However, a recent federal court opinion of first impression clarifies that local law enforcement agencies are not required to comply with ICE detainers. In *Buquer v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 68326 (S.D. Ind. June 24, 2011), a federal district court has provided the first clear guidance on the status of detainers as voluntary. The court stated that a detainer "is not a criminal warrant, but rather a voluntary request that the law enforcement agency "advise [the Department of Homeland Security (DHS)], prior to release of the alien, in order for [DHS] to arrange to assume custody." *Buquer* at *9. The court's interpretation provides the first clear indication that, despite some conflicting language within the regulations, ICE detainers are not mandatory orders, but merely a request for cooperation.

We further note that this interpretation is consistent with constitutional prohibitions against the federal government enacting laws directing states to participate in the administration of a federally enacted regulatory scheme. It is our opinion, based upon this recent clear authority from the federal courts, that ICE detainers may be treated by the Sheriff as requests for cooperation, not as orders with which they are required to comply. Please feel free to contact me if you have any further questions.

Very truly yours,

Patrick T. Driscoll, Jr.
Deputy State's Attorney
Chief, Civil Actions Bureau

Document 3

Opinion from the Office of the Cook County State's Attorney; dated September 14, 2011; re: Board's Budget Authority – ICE Detainer Ordinance

OFFICE OF THE STATE'S ATTORNEY
COOK COUNTY, ILLINOIS
CIVIL ACTIONS BUREAU

ANITA ALVAREZ
STATE'S ATTORNEY

500 RICHARD J. DALEY CENTER
CHICAGO, ILLINOIS 60602
AREA 312-603-5440

September 14, 2011

Peter M. Kramer
General Counsel
Sheriff's Office of Cook County
Richard J. Daley Center
50 W. Washington – Room 704
Chicago, Illinois 60602

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

Re: 11-313: Board's Budget Authority - ICE Detainer Ordinance.

Dear Mr. Kramer:

Issue Presented

You have asked this Office to advise you whether the County Board's adoption, on September 7, 2011, of an ordinance titled "Policy for responding to ICE detainers," is a proper exercise of the County's home rule authority.

Conclusion

The ordinance, which directs the Sheriff to decline ICE detainer requests unless the County has entered into a written agreement providing for reimbursement from the federal government for voluntarily holding persons, appears to be a proper exercise of the County's home rule power to perform any function pertaining to its government and affairs. *See*, 1970 Ill. Const, art. VII, § 6 (a).

Discussion

Article VII, section 6(a) of the Illinois Constitution provides in relevant part as follows:

> ...Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare...

1970 Ill. Const, art. VII, § 6 (a). In the preamble to the ordinance, the County Board makes several

legislative findings, including that it "costs Cook County approximately $43,000 per day to hold" the detainees on a voluntary basis. The County's finances are clearly a matter pertaining to its own government and affairs. *See, Allen v. County of Cook*, 65 Ill. 2d 281 (1976).

We note that the ordinance does not appear to impact the County's budgetary process, which is set forth in Division 6-24 of the Counties Code, titled "Cook County Appropriations." 55 ILCS 5/6-24001 *et seq.*

If this Office can be of further assistance to you in this matter please contact us.

Yours truly,

ANITA ALVAREZ
STATE'S ATTORNEY OF COOK COUNTY

Sara-Dillery Hynes
Assistant State's Attorney
Transactions and Health Law
(312) 603-3474

cc: Randolph M. Johnston, Supervisor, Transactions and Health Law

Document 4

Opinion from the Office of the Cook County State's Attorney; dated October 5, 2011; re: 11-335 Legitimate Law Enforcement Purpose Pursuant to 11-O-73

OFFICE OF THE STATE'S ATTORNEY
COOK COUNTY, ILLINOIS
CIVIL ACTIONS BUREAU

ANITA ALVAREZ
STATE'S ATTORNEY

500 RICHARD J. DALEY CENTER
CHICAGO, ILLINOIS 60602
AREA 312-603-5440

October 5, 2011

Peter M. Kramer
General Counsel
Sheriff's Office of Cook County
Richard J. Daley Center
50 W. Washington – Room 704
Chicago, Illinois 60602

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

In Re: 11-335 Legitimate Law Enforcement Purpose Pursuant to 11-O-73

Dear Mr. Kramer:

You have asked this office whether the "legitimate law enforcement purpose" language described in Section 46-37 of Ordinance 11-O-73, "Policy for Responding to ICE Detainers" (the "Ordinance") permits the Sheriff to exercise discretion in complying with ICE detainers where there is a legitimate law enforcement purpose.

The Ordinance is clear that the Sheriff must decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by the County in complying with the ICE detainers are reimbursed. The Sheriff does not have discretion regarding compliance with ICE detainers even where there is a legitimate law enforcement purpose because the "legitimate law enforcement purpose" contemplated by the Ordinance refers to communication with ICE for purposes other than ICE detainers.

Please feel free to contact me if you have any further questions.

Very truly yours,

ANITA ALVAREZ
STATE'S ATTORNEY OF COOK COUNTY

By: Julia Dimoff

Julia C. Dimoff
Assistant State's Attorney
(312) 603-5468

Document 5

Letter from Cook County Sheriff Thomas Dart to Cook County Commissioner Larry Suffredin; dated December 15, 2011

PHONE (312) 603-6444
SHERIFF'S OFFICE OF COOK COUNTY, ILLINOIS
RICHARD J. DALEY CENTER
50 W. WASHINGTON - ROOM 704
CHICAGO, IL 60602
THOMAS J. DART
SHERIFF

December 15, 2011

Honorable Larry Suffredin
Cook County Board of Commissioners
118 N. Clark Street, Room 567
Chicago, Illinois 60602

Dear Commissioner Suffredin,

It has been just over a month, November 2nd, since the last written correspondence with my office and you regarding Immigration Customs Enforcement (ICE) detainers. There have been productive conversations taking place and I wanted to reiterate that I believe it is important we move forward on this issue.

I believe that measures can be put into place that would allow the residents of Cook County to feel safe in their community without unfairly targeting any immigrant community. As I mentioned in the last letter, it is my hope that you agree that those charged with a "forcible felony," those who have a history of convictions and those on a Homeland Security Terrorist Watch List should be held on an ICE detainer rather than released immediately.

The media has reported on some of the individuals that have been released since the passage of the ordinance on September 7th of this year. There are two cases in particular that I wanted to point out on why I believe our communities would be safer without those charged with serious offenses on our streets.

The first individual was arrested in June (prior to ordinance being passed) for burglary. This individual along with an accomplice broke into a home where a 13 year old girl was hiding in the basement. The girl was able to call the police and both were arrested. He was bonded out in October, has not shown for his court date and has a warrant out for his arrest. This individual is also a child sex offender and has been deported to Mexico twice in the past. The ICE detainer was placed on this individual in June.

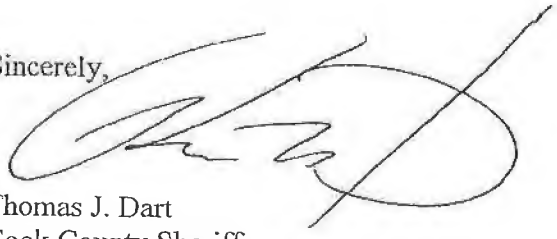
The second individual was arrested in June for aggravated DUI and leaving the scene of an accident. After hitting and rolling over the victim while trying to leave the scene he was cornered by another car. He then jumped from his car and tried running from the scene but was thankfully caught. According the Medical Examiner's Office the victim died of multiple injuries from being hit by a vehicle. This individual was bonded out in November, has not shown for his court date and has a warrant out for his arrest. The ICE detainer was placed on this individual in June.

I want to reiterate two items that I mentioned before. First, the ordinance actually articulates – as did the September 7th testimony of both legal counsels, the States Attorney's and Sheriff's – that this ordinance would allow those charged with either a misdemeanor ***or felony*** back on the streets immediately once their bond was paid. No consideration is given to the severity or type of crime, but rather the ordinance demands that ICE detainers not be honored as a blanket policy for ALL offenders.

The second issue is a belief that the Sheriff's office has "discretion" to hold someone on an ICE detainer should we choose to do so. Again, not only does the ordinance NOT allow us the discretion to hold someone on an ICE detainer, but a States Attorney's opinion states quite clearly, "The Sheriff does not have discretion regarding compliance with ICE detainers even where there is a legitimate law enforcement purpose because the 'legitimate law enforcement purpose' contemplated by the Ordinance refers to communication with ICE for purposes other than ICE detainers."

I am once again requesting that the Board conduct a hearing so that all parties affected by ICE detainers in the Cook County Criminal Justice System be heard, including the Juvenile Detention Center and the Judiciary. Attached is the language I am proposing for the amendment. I implore you give it serious consideration.

Sincerely,



Thomas J. Dart
Cook County Sheriff

Pending Charge

ICE Detainers received for individuals who have been booked into the Cook County Sheriff's custody, shall be booked and/or honored for anyone who has been charged with:

a) At least one felony which is a "forcible felony" in Illinois, or the equivalent under the law of any other jurisdiction, as defined in 720 ILCS 5/2-8 treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against an individual. Or
b) A Class 2 felony or greater offense under the Illinois Controlled Substances Act, 720 ILCS 570/100 et seq., the Cannabis Control Act, 720 ILCS 550/1 et seq., or the Methamphetamine Control and Community Protection Act, 720 ILCS 646/1 et seq., or the equivalent under the law of any other jurisdiction.

If the charge against the individual is subsequently dismissed and prior to the release it is verified that the individual does NOT meet any of the criteria below, that person shall be released and the ICE Detainer will NOT be honored.

Previously Convicted

ICE Detainers received for individuals who have been booked into the Cook County Sheriff's custody shall be booked and/or honored for anyone who has been previously CONVICTED of

a) felony offense(s) or
b) two misdemeanor offenses (resulting from two different criminal cases)

OR

Prior to any release, a deputy shall check the subject's Criminal History Information in CII and the FBI Criminal history databases. Individuals are NOT eligible for release and ICE Detainers shall be booked and/or honored for anyone who has been previously ARRESTED for any

a) domestic violence offence either for a felony or misdemeanor classification, or
b) violation of a domestic violence protective order.

Document 6

Letter from John Morton, Director of United States Immigration and Customs Enforcement to Cook County President Toni Preckwinkle; dated January 4, 2012

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

JAN 0 4 2012

Ms. Toni Preckwinkle
President, Cook County Board of Commissioners
118 N. Clark Street, Room 537
Chicago, IL 60602

Dear Ms. Preckwinkle:

I write to express my serious concerns with the Ordinance passed by the Cook County Board of Commissioners on September 7, 2011, entitled "Policy for Responding to ICE Detainers" (the Ordinance). As you know, the Ordinance directs the Sheriff to decline immigration detainer requests, bars U.S. Immigration and Customs Enforcement (ICE) officials from County facilities when enforcing immigration laws, and prohibits County personnel from responding to ICE inquiries. This Ordinance undermines public safety in Cook County and hinders ICE's ability to enforce the nation's immigration laws.

Of great concern is the serious impediment the Ordinance poses to ICE's ability to promote public safety through the identification of deportable criminals. As written, the Ordinance restricts County assistance in all immigration enforcement matters—including those involving individuals convicted of a crime, whether violent or otherwise. As a result, the Ordinance disrupts the federal government's efforts to remove deportable criminal offenders from the country and instead allows for their release back into the community. In light of criminal recidivism rates, the release of so many these individuals to the streets of Cook County is deeply troubling and directly undermines public safety.

Our concern is not an abstract one, as the Ordinance's restrictions have already limited ICE's ability to take custody of criminal aliens detained in Cook County facilities. Since the Ordinance was enacted, ICE has lodged detainers against more than 268 removable aliens in Cook County's custody who have been charged with or convicted of a crime, including serious and violent offenses like assault on a law enforcement officer. Cook County has not honored any of these 268 detainers, however, preventing ICE from considering removal proceedings against all but 15 of these individuals whom we were able to locate independently and arrest following their release into the community. The potential gravity of Cook County's actions is highlighted in very real terms in today's *Chicago Tribune* article concerning the case of Saul Chavez.

In addition to undermining local public safety, the Ordinance may also violate federal law. The Immigration and Nationality Act provides that a "local government entity may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving

from, [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." *See* 8 U.S.C. § 1373(a). This provision is designed to ensure that ICE's ability to enforce immigration law in our communities is not unduly obstructed by state or local laws or policies. The Ordinance nevertheless prohibits County personnel from responding to ICE inquiries or communicating with ICE regarding an individuals' incarceration status or release date.

The Ordinance also inhibits ICE's ability to validate Cook County's annual request for State Criminal Alien Assistance Program (SCAAP) funding. As you are aware, through the SCAAP program, the federal government reimbursed Cook County with nearly $3.4 million in 2010 and nearly $4.4 million in 2009 for the cost of detaining criminal aliens in Cook County detention facilities. In administering the SCAAP program, the Department of Justice requires the Department of Homeland Security to verify the immigration status of inmates for whom state and local agencies seek reimbursement. Without access to the Cook County jails, ICE's ability to accurately verify the immigration status of criminal aliens detained by Cook County becomes more difficult. Moreover, it is fundamentally inconsistent for Cook County to request federal reimbursement for the cost of detaining aliens who commit or are charged with crimes while at the same time thwarting ICE's efforts to remove those very same aliens from the United States.

Because of the gravity of these concerns, I request that you consider amending the Ordinance to avoid any legal conflict with federal law and to restore sensible cooperation between Cook County and ICE when it comes to the identification and removal of deportable offenders incarcerated in Cook County jails.

Sincerely yours,

John Morton
Director

Document 7

Letter from Cook County President Toni Preckwinkle to John Morton, Director of United States Homeland Security; dated January 19, 2012

OFFICE OF THE PRESIDENT
BOARD OF COMMISSIONERS OF COOK COUNTY
118 NORTH CLARK STREET
CHICAGO, ILLINOIS 60602
(312) 603-6400
TDD (312) 603-5255

TONI PRECKWINKLE
PRESIDENT

January 19, 2012

Mr. John Morton
Director
U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

Dear Mr. Morton:

I am in receipt of your letter, date-stamped January 4, 2012, in which you express your concerns regarding Cook County's policy for responding to ICE detainers.

Let me begin by emphasizing that like you, I am firmly committed to the public safety of all residents of Cook County. I also support the U.S. Immigration and Customs Enforcement being able to carry out its duties and responsibilities. What is troubling to me, however, is a policy which treats people differently under the law solely based upon their immigration status.

You raise the concern that the County ordinance poses a threat to ICE's ability to identify deportable criminals. Subsection (a) of the ordinance does not prohibit honoring of ICE detainers if, "...there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed." In other words, the ordinance makes it clear that if your agency agrees in writing to cover the costs for housing the ICE detainees at the jail for the additional 48 hours (or, up to 96 hours over weekends) then the detainer could be honored. It costs the taxpayers of Cook County $143.00 per day to house an inmate in the Cook County Jail and we cannot justify shouldering the cost of holding detainees beyond their release date. Please be reminded of what is stated in the ordinance itself: "There (is) no legal authority upon which the federal government may compel an expenditure of County resources to comply with an ICE detainer."

Moreover, subsection (b) of the ordinance does not prohibit ICE agents from having access to detainees if, "...ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws..." The

ordinance recognizes there may be legitimate public safety reasons for providing access to detainees and provides statutory exceptions for the same. Again, the ordinance does not pose a threat to ICE's ability to identify deportable criminals and the very fact that an ICE detainer is issued means ICE is already aware of an individual's whereabouts.

In your letter, you reference the fact that, "since the Ordinance was enacted, ICE has lodged detainers against more than 268 removable aliens in Cook County's custody who have been charged with or convicted of a crime, including serious and violent offenses..." This raises two points that are troubling to me in light of your public safety argument. First, honoring ICE detainers would apply to those who have yet to be convicted of a crime. If an individual is charged with a violent offense or is a flight risk then an appropriate bond or no bond should be set to address public safetey; immigration status should not be the driving force for detainment. Second, you make it clear that not all of the charges are for serious or violent offenses. Again, it belies your argument that there is a threat to public safety when the charge could be a low-level or non-violent offense.

You also indicate that out of the 268 ICE detainers lodged in Cook County since enacting the ordinance, you were only able to independently locate and arrest 15 of these individuals post-release. As I have previously stated, I fully support ICE's ability to carry out its responsibilities, yet, I firmly believe it must do so through its own due diligence. You refer to Saul Chavez, for example, who was housed in the Cook County Jail for five months after the ICE detainer was issued. As you are well aware, this was not Mr. Chavez's first run-in with the law and prior to the arrest on the most recent charge, he had served out a sentence of probation. ICE was not only aware of Mr. Chavez's whereabouts during those five months he was detained in 2011 and could have pursued deportation efforts, but I imagine ICE was also aware of Mr. Chavez's status upon his prior conviction. The reason his case was not prioritized while under probation or during his 2011 detainment escapes me.

Your letter points out that our ordinance *may* also violate federal law based upon a provision under the Immigration and Nationality Act. In your letter, you quote a portion of 8 U.S.C. Section 1373(a). However, if you were to quote the entire provision of sub-section (a), it reads, "*Notwithstanding any other provision of Federal, State, or local law,* a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." (Italics added) In this instance, there is a local law—our policy for responding to ICE detainers—that outlines limitations for utilizing County staff and resources to respond to ICE inquiries. As previously mentioned, the federal government cannot compel a local agency to use its resources to enforce federal immigration laws. Furthermore, it is my understanding that ICE continues to have personnel in Cook County's criminal courts on a daily basis and that its officials are not prohibited from gathering needed information from other means.

Finally, you reference that the County Ordinance , "...inhibits ICE's ability to validate Cook County's annual request for State Criminal Alien Assistance Program (SCAAP) funding." We are certainly aware of and appreciate being reimbursed by the federal government for the cost of detaining criminal aliens in Cook County detention facilities. However, it is my understanding

that SCAAP funding only applies to the time that an individual is rightly detained in our jail. Once that individual posts bond or charges are dismissed, they are to be released—regardless of their immigration status. SCAAP funds do not cover costs of detaining individuals for the additional 48 hours. Cook County Jail will continue to detain individuals per judge's discretion and, during that time, SCAAP funds should be available if detaining immigrants. It would be unjust to hold someone at the mere request of another governmental entity when that individual has met all prerequisites for being released from the jail. It may be true, as you state in your letter, that ICE's ability to verify immigration status of criminal aliens detained by Cook County "becomes more difficult," but, that certainly does not mean it is impossible.

Mr. Morton, I welcome the opportunity to meet with you directly on these issues. This is not a matter I take lightly and as I have said throughout this process, I continue to be open to thoughtful dialogue and reasoning. If you are interested in scheduling a meeting to discuss this further, please contact me directly.

Sincerely,

Toni Preckwinkle
President

Document 8

Opinion from the Office of the Cook County State's Attorney; dated January 12, 2012; re: 12-05: Sheriff's Proposed Revisions to ICE Detainer Ordinance

ANITA ALVAREZ
STATE'S ATTORNEY

OFFICE OF THE STATE'S ATTORNEY
COOK COUNTY, ILLINOIS
CIVIL ACTIONS BUREAU

500 RICHARD J. DALEY CENTER
CHICAGO, ILLINOIS 60602
AREA 312-603-5440

January 12, 2012

Honorable Peter N. Silvestri
Commissioner – 9th District
Cook County Board of Commissioners
County Building – Room 567
118 North Clark Street
Chicago, Illinois 60602

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

In Re: **12-05: Sheriff's Proposed Revisions to ICE Detainer Ordinance**

Dear Commissioner Silvestri:

You have asked this Office to advise you concerning the legality of possible revisions to Section 46-37 of the Cook County Code of Ordinances, establishing the County's "Policy for responding to ICE Detainers," suggested by the Cook County Sheriff. (Ordinance attached.) You attach correspondence sent to you by the Sheriff as well as the Sheriff's suggested revisions to the ordinance. These revisions (attached), which are presented in general form, rather than as an ordinance amendment, would require the Sheriff to honor ICE detainers for certain categories of detainees including those charged with forcible felonies or specified drug offenses and also those detainees previously convicted of a felony offense or two misdemeanor offenses.

You additionally ask that this Office advise concerning any discretion the Sheriff's office currently may have with respect to ICE detainers.

Issues Presented

Does the Sheriff have any discretion with respect to cooperating with detainer requests issued by the Bureau of Immigration and Customs (ICE)?

May the Cook County Code Section 46-37 be amended to require the Sheriff to honor ICE detainers for certain categories of detainees?

Conclusion

Cook County Code Section 46-37 is clear that the Sheriff must decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by the County in complying with the ICE detainers are reimbursed. There being no such agreement, the Sheriff does not have discretion to choose to cooperate with ICE detainer requests. *See* Cook County Code §46-37(a).

Cook County Code Section 46-37 may be amended to require that the Sheriff comply with ICE detainer requests for certain categories of detainees such as those charged with forcible felonies or specified drug offenses, as well as those previously convicted of felonies or multiple misdemeanors. However, the classifications set forth must be reasonable and bear a rational relationship to a legitimate government interest. Proposed classifications based on current charges and prior convictions would likely satisfy these due process and equal protection concerns.

Discussion

ICE has the authority to issue a detainer requesting that an inmate be held for a brief period of time after the completion of a term of imprisonment or release on bail. The regulation found at 8 CFR 287.7 governs ICE detainers and was promulgated pursuant to 8 USC 1227 and 1357 (Sections 236 and 287 of the Immigration and Nationality Act), which authorizes any immigration officer to issue a form I-247, Immigration Detainer, to any other Federal, State or local law enforcement agency. The purpose of ICE detainers are to allow ICE agents time to take into custody a detainee whose immigration status is in question before the detainee is released from the law enforcement agency's custody. Subsection 287.7(d) directs the law enforcement agency to maintain custody of the alien for a period not to exceed 48 hours (excluding weekends and holidays), for this purpose. 8 CFR 287.7(d). Detainers issued to local law enforcement agencies such as the Sheriff are not mandatory orders or warrants but instead are requests by ICE for the Sheriff's voluntary cooperation in keeping a suspected alien in custody, and the detainer automatically expires at the end of the 48 hour period. *See, Buquer v. City of Indianapolis,* 2011 U. S. Dist. LEXIS 68326 (S.D. Ind. June 24, 2011). Where a local law enforcement agency holds a suspected alien on an ICE detainer in excess of the 48 hour period, however, the local law enforcement agency may be subject to liability. *See, Rivas v. Martin,* 781 F. Supp. 2d 776 (N. D. Ind. 2011).

The County Board adopted Ordinance No. 11-O-73, "Policy for Responding to ICE Detainers," on September 7, 2011 (codified in Cook County Code § 46-37). Subsection (a) of this ordinance effectively removes any discretion delegated to the Sheriff by federal regulation for voluntary compliance with ICE detainers. That subsection provides as follows:

> (a) The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.

Cook County Code § 46-37(a). While there is federal statutory authority to enter into such agreements, no agreement has been entered into by the County and the United States. *See* 8 U.S.C §

1357(g). Thus, pursuant to the plain language of this subsection, the Sheriff is required to decline ICE detainer requests. In this regard, we note that subsection (b), which permits ICE agents access to County facilities only in the limited context of criminal warrants or "legitimate law enforcement purposes" unrelated to the enforcement of immigrations, does not provide any alternate basis for authorizing the Sheriff to cooperate with ICE detainers.

Should the County Board wish to restore the Sheriff's discretion to voluntarily comply with ICE detainer requests, or to require that the Sheriff comply with ICE detainer requests for certain defined categories of detainees, Section 46-37 may be amended to so provide.

With regard to the Sheriff's general suggested revisions, the proposal to mandate compliance with ICE detainer requests for jail detainees charged with "forcible felonies" pursuant to Criminal Code section 2-8 (720 ILCS 5/2-8), and for those charged with certain specified felony drug offenses, as well as those previously convicted of a felony offense or two separate misdemeanor offenses appears to comport with equal protection and due process requirements. The proposed classifications, based on a detainee's current criminal charges and prior convictions appear to be reasonable and bear a rational relationship to a legitimate government interest, *i.e.*, public safety and cooperation with the federal government's immigration enforcement efforts. *See, Brewer v. Peters,* 262 Ill. App. 3d 610 (5th Dist. 1994). Although the law is not clear, the Sheriff's alternate proposal to require compliance with ICE detainer requests for jail detainees based solely on the fact they had been previously arrested for certain types of offense, regardless of whether they had been convicted of such an offense, may be more vulnerable to challenge as not being rationally related to a legitimate government interest.

If this Office can be of further assistance to you in this matter please contact us.

Very truly yours,

Patrick T. Driscoll, Jr.
Deputy State's Attorney
Chief, Civil Actions Bureau

Document 9

Letter from Hanover Park Village President Rodney Craig to Cook County Commissioner Larry Suffredin; dated January 18, 2012

Village of Hanover Park

Municipal Building
2121 West Lake Street
Hanover Park, Illinois
60133-4398

630-372-4200
Fax 630-372-4215

Rodney S. Craig
Village President

Eira L. Corral
Village Clerk

Ronald A. Moser
Village Manager

January 18, 2012

RECEIVED
1/26/12

Hanover Park

Mr. Larry Suffredin,
County Commissioner - 13th District
Cook County Board
118 N. Clark Street - Room 567
Chicago, IL 60602

Dear Mr. Suffredin:

Recently, a meeting took place between myself, Chief David Webb (Hanover Park Police Department), Cook County Sheriff Tom Dart, and three police associations being the North Suburban Chiefs of Police Association, West Suburban Chiefs of Police Association, and South Suburban Chiefs of Police Association. This meeting was to discuss the important topic of ICE detainers. The outcome of this meeting was very positive.

The County Board of Cook County had passed its Ordinance 11-O-73 on September 7, 2011 which sets forth a concise and inflexible policy that Cook County decline ICE detainers absent a written agreement with the Federal government that all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed and that absent a criminal warrant, ICE agents shall have no access to individuals in county facilities nor shall they be allowed to use county facilities for investigative interviews or other purposes, nor shall county personnel spend any time in communication with ICE officials regarding inmate's status or release dates.

The Village of Hanover Park is a Cook County community with a police department that processes incarcerated arrestees through the Cook County Sheriff's office. The aforementioned ordinance directly affects the residents of the Village of Hanover Park, as well as all other residents of the State of Illinois. The people of Illinois rely on Cook County and its Sheriff's department's jail in processing those charged with and held on serious crimes.

The policy of the Cook County Board has resulted in individuals charged with battering Village police officers not being held on an ICE detainer, but rather being afforded a "benefit" by the Cook County Board directing their release without concern of an ICE detainer, all to the detriment of local Cook County municipal police efforts, namely the Village of Hanover Park's police department and its officers.

Document 10

Letter from the Cook County Public Defender; dated February 1, 2012; Re: Ordinance 46-37 and Proposed Amendments

Law Office of the
COOK COUNTY PUBLIC DEFENDER
69 W WASHINGTON • 16TH FLOOR • CHICAGO, IL 60602 • (312) 603-0600

Hon. Abishi C. Cunningham, Jr. (Ret.) • Public Defender

Hon. Toni Preckwinkle
President, Cook County Board of Commissioners
118 N. Clark Street, Room 537
Chicago, IL 60602

February 1, 2012

Re: Ordinance 46-37 and Proposed Amendments

Dear President Preckwinkle,

On September 7, 2011, you and The Cook County Board of Commissioners passed Ordinance 46-37 regarding Immigration and Customs Enforcement ("ICE") detainers. As reflected in Ordinance 46-37, ICE Detainers are not warrants or court orders and have no due process or constitutional safeguards attached to them. ICE Detainers do not have the force of law and are merely requests that Cook County detain even those who have posted bond at the County's expense. Ordinance 46-37 was fiscally responsible in insuring that the County was reimbursed for housing those whom ICE wished to detain.

Ordinance 46-37 also reflected Cook County's history and doctrine embedded in the Sanctuary resolution 07 R 240, offering equal protection to all Cook County Residents regardless of national origin, citizenship or immigration status. That resolution, as well as Ordinance 46-37, recognized that equal protection for all Cook County residents will "engender trust and cooperation between law enforcement officials and immigrant communities to aid in crime prevention…"

Both amendments being considered effectively repeal the existing ordinance by carving out exceptions that allows the Sheriff of Cook County absolute discretion in cooperating and reporting to ICE in advance of, and one assumes in expectation of, ICE detainers. Moreover, both amendments vitiate the requirement that the federal government agree to reimburse Cook County for housing costs. As a detainer is not based on observable evidence or investigation, such as would be required for a warrant or court order, citizens of Cook County have been detained and held, despite posting bail, at the County's expense until ICE Agents appear.

The language in the amendments that allows reporting of those suspected of violating immigration laws is vague, contains no due process safeguards as would a warrant or a police search requiring "probable cause," and will lead to the type of discrimination that the existing ordinance addressed and corrected. Specifically, Ordinance 476-37 expressly referenced that "ICE detainers encourage racial profiling and harassment…" Again, the proposed amendments are a repealing of the Ordinance they purport to amend.

It is easy and historically commonplace to scapegoat immigrant communities in times of economic distress. It is a simple matter to target the most vulnerable of Cook County's residents, most of whom are law abiding, tax paying residents, who also contribute to social security money they themselves will never see.

The laws and rules Cook County pass reflect who we are as a County, who we are as a people—our character and our conscience. Ordinance 46-37 reflected the best and the most courageous of our traditions: extending the equal protection of our laws to those who cannot protect themselves. The Law Office of the Cook County Public Defender respectfully urges the Board of Commissioners to reject any amendments to the existing ordinance. Ordinance 46-37 has deep constitutional implications in its implementation; it ought not to be subject to the vicissitudes and prejudices attendant upon a bad economy.

Sincerely,

Abishi C. Cunningham

Hon. Abishi C. Cunningham, Jr. (Ret.)
Public Defender

Cc: The Cook County Board of Commissioners

Document 11

Letter from Cook County Sheriff Thomas Dart to John Morton, Director of U.S. Immigration and Customs Enforcement; dated January 20, 2012

OFFICE OF THE SHERIFF
RICHARD J. DALEY CENTER
COOK COUNTY
CHICAGO, ILLINOIS 60602

THOMAS J. DART
SHERIFF

January 20, 2012

RECEIVED
1/23/12

Director John Morton
U.S. Immigration and Customs Enforcement
500 12th Street, SW
Washington, DC 20536

Dear Director Morton:

As you are aware there has been a continuing debate throughout the United States and in particular Cook County, Illinois on how and if the County is to respond to ICE detainers. This week, the Cook County Board of Commissioners moved an ordinance into their Legislation and Intergovernmental Relations Committee to further discussions on if and how the County should respond to detainers.

Today the Committee notified me that the hearing will take place on Thursday, January 26, 2012 at the County Building, which is located at 118 North Clark Street in Chicago, Illinois. The hearing will start promptly at 10:00 A.M. in Room 569.

It is my hope and that of all the stake holders in the County, that you will be present for this important hearing. I have told others and I will tell you, I believe that measures can be put into place that would allow the residents of Cook County to feel safe in their community without unfairly targeting any immigrant community. Good policy will be achieved by bringing everyone to the table to hear their questions, comments and concerns. It would be a tremendous value if you would be able to share with the Committee your insights into what is happening with regards to securing our communities.

Sincerely,

Thomas J. Dart
Cook County Sheriff

cc: Commissioner Larry Suffredin